Y4.IN 2/11 : S. HRG 103-225

S. HRG. 103-225

NATIVE AMERICAN TRUST FUND ACCOUNTING AND MANAGEMENT REFORM ACT OF 1993

Y4.IN 53:103-43

National Fish and Wildlife Foundati... ARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 925

TO REQUIRE THE SECRETARY OF THE INTERIOR TO PAY INTEREST ON INDIAN FUNDS INVESTED; TO AUTHORIZE DEMONSTRATIONS OF NEW APPROACHES FOR THE MANAGEMENT OF INDIAN TRUST FUNDS; TO CLARIFY THE TRUST RESPONSIBILITY OF THE UNITED STATES WITH RESPECT TO INDIANS; TO ESTABLISH A PROGRAM FOR THE TRAINING AND RECRUITMENT OF INDIANS IN THE MANAGEMENT OF TRUST FUNDS; TO ACCOUNT FOR DAILY AND ANNUAL BALANCES ON AND TO REQUIRE PERIODIC STATEMENTS FOR INDIAN TRUSTS FUNDS

JUNE 22, 1993

WASHINGTON, DC

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NATIVE AMERICAN TRUST FUND ACCOUNTING AND MANAGEMENT REFORM ACT OF 1993

TUESDAY, JUNE 22, 1993

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m. in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, McCain, and Wellstone.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning and welcome to this hearing of the Committee on Indian Affairs.

This morning the committee will receive testimony on S. 925, the Native American Trust Fund Accounting and Management Reform Act of 1993.

We will also receive testimony on the longstanding and continuing problems associated with the management of the Indian Trust Fund accounts.

In April 1992, the House Committee on Government Operations issued a report which dramatically illustrates how the Federal Government's indifferent supervision and control of the Indian Trust Funds has consistently resulted in a failure to exercise its fiduciary responsibilities.

This report further details how the Federal trustee has failed all reasonable expectations of the tribal and individual account holders, Congress, and the American taxpayer.

The report is replete with examples of how the management of the Indian Trust Fund has been grossly inadequate. For example, the United States has never been able to account accurately for trust fund moneys. Indeed, it cannot even provide account holders with periodic statements on their account balances. It does not consistently and prudently invest trust funds and pay interest to account holders. It does not have written policies or procedures that cover all of its trust fund accounting practices.

Financial management by the Federal Government of the trust fund has been neglected for decades. There exists a crisis in the Government's management of the trust fund that can only be cured by radical changes.

Sadly, the real losers in the mismanagement of the Indian Trust Funds are the Indian tribes and individual Indian account holders. These account holders are being victimized by the Government, yet they have no recourse except to the very agency that is responsible for their predicament.

This bill, S. 925, is designed to correct these deficiencies.

One, it will require the Secretary of the Interior to invest and pay interest on individual Indian money funds held in trust by the Federal Government;

Two, it will authorize demonstrations of new and innovative approaches for the management of Indian Trust Funds;

Three, it will clarify the trust responsibility of the United States with respect to management of these funds;

Four, it will establish a program for the training and recruitment of Indian people in the management of their own financial affairs; and

Five, it will require periodic accounting of balances to Indian Trust Fund account holders.

The enactment of this measure, S. 925, is necessary to reform the management of the Indian Trust Fund and to give native people a greater voice in the management of their own funds.

[Text of S. 925 follows:]

II

103D CONGRESS
1ST SESSION

S. 925

To require the Secretary of the Interior to pay interest on Indian funds invested, to authorize demonstrations of new approaches for the management of Indian trust funds, to clarify the trust responsibility of the United States with respect to Indians, to establish a program for the training and recruitment of Indians in the management of trust funds, to account for daily and annual balances on and to require periodic statements for Indian trust funds, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 7 (legislative day, APRIL 19), 1993

Mr. INOUYE (for himself, Mr. MCCAIN, Mr. SIMON, Mr. CAMPBELL, Mr. WELLSTONE, and Mr. DASCHLE) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To require the Secretary of the Interior to pay interest on Indian funds invested, to authorize demonstrations of new approaches for the management of Indian trust funds, to clarify the trust responsibility of the United States with respect to Indians, to establish a program for the training and recruitment of Indians in the management of trust funds, to account for daily and annual balances on and to require periodic statements for Indian trust funds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Native American Trust Fund Accounting and Management Reform Act of 1993".

SEC. 2. DEFINITIONS.

For purposes of this Act—

(1) the term "Secretary" means the Secretary of the Interior; and

(2) the term "Bureau" means the Bureau of Indian Affairs of the Department of the Interior.

TITLE I—TRUST FUND INTEREST PAYMENTS

SEC. 101. PAYMENT OF INTEREST ON FUNDS INVESTED.

(a) PAYMENT OF INTEREST.—(1) The fourth proviso of subsection (a) of the first section of the Act of June 24, 1938 (25 U.S.C. 162a), is amended by striking "may invest" and inserting "shall invest".

(2) The first section of the Act of June 24, 1938 (25 U.S.C. 162a), is amended by adding at the end the following new subsection:

"(d) Amounts deposited or invested under subsection (a) shall earn interest at the appropriate rates, taking into consideration the type of deposit or investment. The Secretary shall periodically pay such interest to the appropriate Indian tribe or individual Indian or, at the election of the Indian tribe or individual Indian, add such interest to the principal so deposited or invested.".

(b) TECHNICAL CORRECTION.—The second subsection (b) of the first section of the Act of June 24, 1938 (25 U.S.C. 162a), as added by section 302 of Public Law 101–644 (104 Stat. 4667), is hereby redesignated as subsection (c).

(c) REPEAL OF LIMITATION ON UNITED STATES LIABILITY.—Paragraph (2) of subsection (c) of the first section of the Act of June 24, 1938, as amended by subsection (b), is amended to read as follows:

"(2) Amounts deposited or invested under this subsection shall generate earnings at the appropriate rates, taking into consideration the type of investment concerned. The Secretary shall periodically pay such earnings to the appropriate Indian tribe or individual Indian or, at the election of the Indian tribe or individual Indian, add such earnings to the principal of such funds so invested.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to interest earned on amounts deposited or invested on or after the date of the enactment of this Act.

SEC. 102. AUTHORITY FOR PAYMENT OF CLAIMS FOR INTEREST OWED.

The Secretary is authorized to make payments to an Indian tribe or an individual Indian—

(1) in full satisfaction of any claim of such Indian tribe or individual Indian for interest on amounts deposited or invested on behalf of such Indian tribe or individual Indian before the date of enactment of this Act under the Act of June 24, 1938 (25 U.S.C. 162a), and who was not paid the appropriate amount of interest on such funds; and

(2) in an amount equal to the interest which would have been earned if funds of such Indian tribe or individual Indians which were subject to the Act of June 24, 1938 (25 U.S.C. 162a), had been deposited or invested in accordance with such Act.

TITLE II—INDIAN TRUST FUND MANAGEMENT DEMONSTRATION PROGRAM

SEC. 201. PURPOSE.

The purpose of this title is to demonstrate new approaches for the management of tribal and individual Indian funds held in trust by the United States and managed by the Secretary through the Bureau, that, consistent with the trust responsibility of the United States and the principles of self-determination, will—

(1) give Indian tribal governments and individual Indian account holders greater control over the management of such trust funds;

(2) pursuant to tribal instructions, involve investment of such trust funds by the Secretary in a manner that will also help to promote economic development in Indian communities; or

(3) otherwise demonstrate how the principles of self-determination can work with respect to the management of such trust funds, in a manner consistent with the trust responsibility of the United States.

SEC. 202. DEFINITION.

For the purposes of this title, except for the purposes of section 208, the terms "Indian tribe" and "tribe" mean—

(1) an Indian tribe;

(2) a consortia of Indian tribes; or

(3) an association of Indians holding individual Indian trust fund accounts managed by the Secretary through the Bureau.

SEC. 203. DEMONSTRATION PLANS.

An Indian tribe may submit to the Secretary a plan to demonstrate a new approach for the management of tribal or individual Indian funds held in trust by the United States for such tribe or the members of such tribe, and as of the date of the enactment of this Act, managed by the Secretary through the Bureau. Such plan may provide for the following:

(1) Management of such funds directly by the Indian tribe in financial institutions selected by the tribe, subject to supervision and oversight by the Secretary. For the purposes of this section, the term "management" may include one or more of the functions carried out, as of the date of the enactment of this Act, by the Secretary through the Bureau in managing such funds, such as collection, disbursement, and investment functions.

(2) Management of such funds by the Secretary in a manner that—

(A) involves investment of such funds in financial institutions on or near the reservation;

(B) increases tribal access to such institutions;

(C) promotes economic development activities on the reservation; or

(D) otherwise promotes tribal priorities.

(3) Management of such funds at the local level through contracts with local financial institutions that meet the purposes of this title.

(4) Such other approaches, as determined by the Secretary, that meet the purpose of this title.

SEC. 204. APPROVAL OF PLANS BY THE SECRETARY.

(a) IN GENERAL.—The Secretary shall approve and implement, or provide for the implementation by an Indian tribe of, a plan that meets the following conditions:

(1) Such plan has been approved by the appropriate Indian tribe, as follows:

(A) For a plan involving tribal trust funds, such plan is accompanied by a resolution from the tribal governing body approving the plan.

(B) For a plan submitted by an Indian tribe (as defined in paragraphs (1) and (2) of section 202) involving individual Indian money accounts, where most or all of the account holders are members of the submitting tribe, it is accompanied by a resolution from the tribal governing body approving the plan, along with a certification that the tribe held no fewer than 2 public meetings to provide an opportunity for account holders to comment on the plan.

(C) For a plan submitted by an Indian tribe (as defined in paragraph (3) of section 202), it is accompanied by a written approval signed by each participating account holder, along with a certification that the tribe on whose reservation the trust asset that is the

source of the funds is located, has been consulted regarding the plan.

(2) The Secretary determines such plan to be consistent with standards of reasonable prudence, after considering all appropriate factors, including but not limited to the following:

(A) The capability and experience of the individuals or institutions that will be managing the trust funds.

(B) The protection against substantial loss of principal.

(C) The rate of return, provided that the plan need not produce the highest rate of return possible if the Indian tribe chooses to accept a lower rate in return for other benefits such as the benefits from investing in local financial institutions.

(D) The ability of the Secretary to effectively monitor the demonstration, pursuant to the trust responsibility of the United States as specified in section 205.

(3) The duration of the plan does not exceed 5 years.

(b) INVESTMENT IN EQUITIES.—Nothing in this section shall prohibit an Indian tribe submitting a plan for

a demonstration under this section from providing in such plan for the investment of its trust funds in equities, if the Secretary determines that such plan meets the standard of reasonable prudence under subsection (a)(2).

SEC. 205. FEDERAL TRUST RESPONSIBILITY.

(a) IN GENERAL.—If an Indian tribe assumes management of trust funds pursuant to a demonstration under this title, the trust responsibility of the United States with respect to such funds shall, for the duration of the demonstration, be limited to the following:

(1) The exercise of reasonable prudence by the Secretary in approving the plan for the demonstration.

(2) An annual audit provided by the Secretary, directly or by contract, to determine that the tribe is performing in conformance with the plan for the demonstration.

(3) If the Secretary finds, through such audits, that the tribe is not in compliance with the terms of the plan, the Secretary shall—

(A) terminate the demonstration; or

(B) prescribe remedial action to be taken by the tribe to achieve compliance with the plan.

(b) DECREASE IN INTEREST AND LOSS OF PRINCIPAL.—If a plan for a demonstration submitted under this title and approved by the Secretary provides for the implementation of such demonstration by the Secretary, the United States shall not be liable, during the period of such demonstration, for any decrease in interest rate or any loss of principal that is proximately caused by the Secretary's prudent implementation of such demonstration.

(c) AGREEMENT.—Prior to the implementation of any demonstration under this title, the Indian tribe involved shall sign a written statement indicating that it understands and accepts the limitations on the trust responsibility of the United States as provided in this section.

SEC. 206. TECHNICAL AND FINANCIAL ASSISTANCE.

The Secretary shall, directly or by contract, provide Indian tribes with technical and financial assistance in developing, implementing, and managing plans for demonstrations under this title.

SEC. 207. NO INCOME TAX CONSEQUENCES.

Funds managed pursuant to a demonstration program under this title, and distributions made from such funds, shall, for purposes of the Internal Revenue Code of 1986, be treated in the same manner as such funds

would be treated if such funds were managed directly by the Secretary, through the Bureau.

SEC. 208. VOLUNTARY WITHDRAWAL FROM TRUST FUND PROGRAM.

(a) IN GENERAL.—An Indian tribe may, in accordance with this section, submit a plan to withdraw some or all funds held in trust for such tribe by the United States and managed by the Secretary through the Bureau.

(b) APPROVAL OF PLAN.—The Secretary shall approve a plan under this section that meets the requirements specified in section 204(a)(1) and subparagraphs (A) and (B) of section 204(a)(2).

(c) TERMINATION OF TRUST RESPONSIBILITY.—Beginning on the date funds are withdrawn pursuant to this section, any trust responsibility of the United States with respect to such funds shall terminate.

SEC. 209. REPORT TO CONGRESS.

The Secretary shall, beginning one year after the date of the enactment of this Act, submit an annual report to the Congress on the implementation of demonstration programs under this title. Such report shall include recommendations for changes necessary to effectively implement the purpose of this title.

TITLE III—RECOGNITION OF TRUST RESPONSIBILITY

SEC. 301. AFFIRMATIVE ACTION REQUIRED.

The first section of the Act of June 24, 1938 (25 U.S.C. 162a), as amended by section 101(a)(2), is amended by adding at the end the following new subsection:

"(e) The Secretary shall properly discharge the trust responsibilities of the United States under this section by—

"(1) providing adequate systems for accounting for and reporting trust fund balances;

"(2) providing adequate controls over receipts and disbursements;

"(3) providing periodic, timely reconciliations to assure the accuracy of accounts;

"(4) determining accurate cash balances;

"(5) preparing and supplying account holders with meaningful periodic statements of their account balances;

"(6) establishing consistent, written policies and procedures for trust fund management and accounting; and

"(7) providing adequate staffing, supervision, and training for trust fund management and accounting.".

SEC. 302. TRUST RESPONSIBILITY WITH RESPECT TO NATURAL RESOURCES.

The Congress recognizes that the trust responsibility of the United States extends to tribal and individual Indian owners of natural resources located within the boundaries of Indian reservations and trust lands. This includes the fiduciary responsibility to manage funds held in trust by the United States for Indian tribes and individual Indians derived from actions including, but not limited to, the use and sale of leased lands, judgments, mineral leases, oil and gas leases, timber permits and sales, and water resources.

TITLE IV—TRAINING AND PERSONNEL

SEC. 401. TRAINING.

(a) TRAINING PROGRAM.—The Secretary shall establish a program to assist Indians, including, but not limited to, employees of the Bureau and members and employees of Indian tribes, to obtain expertise in the management of trust funds. Components of such program may include the following:

(1) An outreach program to encourage and assist Indians to obtain employment with private financial institutions.

(2) Agreements with financial institutions and other entities under which such entities would pro-

vide classroom training, on-the-job training, internships, and employment opportunities not to exceed 2 years, for employees and prospective employees of the Bureau.

(b) RECRUITMENT.—

(1) EMPLOYMENT DESCRIPTIONS.—The Secretary shall ensure that the employment description for any Federal position related to the management of Indian trust funds contains requirements necessary to ensure that a person filling such position would have the necessary skills, based on industry standards, to fully perform the position's responsibilities in a manner consistent with the responsibility of the United States to properly manage Indian trust funds.

(2) PAY.—The Secretary, in consultation with the Office of Personnel Management, shall establish the rate of pay payable for a position related to the management of Indian trust funds at a level of the General Schedule appropriate for such position.

(c) INDIAN PREFERENCE.—Nothing in this title shall authorize or permit any waiver of Indian preference laws as such term is defined in section 2(f)(2) of Public Law 96–135 (25 U.S.C. 472 et seq.).

TITLE V—RESPONSIBILITY TO ACCOUNT FOR INDIAN TRUST FUNDS

SEC. 501. RESPONSIBILITY OF SECRETARY TO ACCOUNT FOR THE DAILY AND ANNUAL BALANCES OF INDIAN TRUST FUNDS.

(a) REQUIREMENT TO ACCOUNT.—The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a).

(b) PERIODIC STATEMENT OF PERFORMANCE.—Not later than 10 business days after the close of a calendar month, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a). The statement, for the period concerned, shall—

(1) identify the source, type, and status of the funds;

(2) the beginning balance;

(3) the earnings and losses; and

(4) the ending balance.

(c) ANNUAL AUDIT.—The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a), and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) after the completion of the audit.

(d) EFFECTIVE DATE.—This section shall take effect October 1, 1993, but shall only apply with respect to earnings and losses occurring on or after October 1, 1993, on funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian.

○

Our first witness today was to have been the distinguished chairman of the Subcommittee on Environment, Energy, and Natural Resources of the Committee on Government Operations, Hon. Mike Synar, but Congressman Synar received word yesterday evening that his mother had passed away, so Chairman Synar has returned home to Oklahoma. Our thoughts and prayers are with the Congressman and his family at this moment.

We will miss his presence this morning, for he is the author of the House companion measure to S. 925, from which the Senate bill is derived.

Before proceeding with the witness list, it is my pleasure to call upon the vice chairman of the committee.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator MCCAIN. Thank you, Mr. Chairman. Thank you for holding this hearing. I think clearly your legislation needs serious consideration. The fact is that this obligation that we have, to manage the Indian Trust Funds in an efficient and proper fashion, has not been carried out for a long, long period of time. I am grateful for Congressman Synar and his efforts to bring to light the problems associated with this issue, and I look forward to us—hopefully—being able to get some legislation enacted this year.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Wellstone.

STATEMENT OF HON. PAUL WELLSTONE, U.S. SENATOR FROM MINNESOTA

Senator WELLSTONE. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased to be a cosponsor of the Accounting and Management Reform Act of 1993. I would like to thank you for organizing this hearing. My sympathies and prayers go to Congressman Synar and his family. I'm sorry he can't be here today.

I would like to take a moment to welcome Chairman Brun of the Red Lake Band of Chippewa Indians. Red Lake has been very aggressive in the pursuit of their legitimate right to manage their trust fund moneys, and I'm sure that's going to become very clear in the course of this hearing.

Mr. Chairman, I read with great interest the memorandum prepared for this hearing by the staff of this committee. Sometimes I don't think we focus enough on the really brilliant work that the staff does.

In it the author notes that in 1828, just 4 years after the Indian Affairs Office was created, a BIA employee described the Office's financial management as follows: "The derangements in the fiscal affairs of the Indian Department are in the extreme." Apparently little has changed in 165 years.

Mr. Chairman, I would just simply like to make the point that mismanagement of the funds of Indian people, the tribal money, is outrageous, and it is a violation of trust responsibility toward Native Americans.

I also would like to make the point, Mr. Chairman—and I will be brief, and I want to hear what the witnesses say—that above

and beyond the negative and the violation of the trust, and it seems to me unconscionable when we are constantly struggling for funds for education and health care and whatnot, that there is another issue. We talk about the importance of empowerment and we talk about the importance of entrepreneurship, and I believe this bill that you have introduced will enable Indian people to have more control over their own capital, more ability to leverage their own capital, and to invest it in economic development. From my point of view, above and beyond stopping the abuse, this in and of itself is the real strength of this legislation.

So I look forward to these hearings, and I count myself as a very strong supporter. I thank you for your leadership.

The CHAIRMAN. I thank you very much, Senator.

Before calling upon the first witness, I have been asked by Congressman Synar to have his statement included in the record. Without objection, it is so ordered.

[Prepared statement of Mr. Synar, submitted for the record, appears in appendix.]

The CHAIRMAN. May I now call upon the Director of Planning and Reporting of the General Accounting Office, Brian Crowley? Mr. Crowley will be accompanied by Gayle Condon, Robert Wagner, and Thomas Armstrong.

Mr. Crowley, I welcome you, sir. Please proceed as you wish.

STATEMENT OF BRIAN P. CROWLEY, DIRECTOR, PLANNING AND REPORTING, GENERAL ACCOUNTING OFFICE, WASHINGTON, DC, ACCOMPANIED BY GAYLE CONDON; ROBERT WAGNER; AND THOMAS ARMSTRONG

Mr. CROWLEY. Thank you, Mr. Chairman. It is a pleasure to be here and to testify before this committee.

Mr. Chairman, I am going to summarize my testimony this morning, and would hope that the entire written statement would be inserted in the record. I will go through it and read certain highlights from it, if that's okay with the Chairman.

Mr. Chairman, last year we testified before this committee on two occasions, in July and August. At that time we talked about the nature of BIA's past problems, the status of its trust fund reconciliations, and actions BIA might take to improve its operations. My statement today is going to discuss BIA actions to correct past problems since our testimonies last year. We will highlight some problems that still need to be addressed, and at your request we will provide our comments on—and support for, quite frankly—S. 925.

By way of background, as you all know, BIA has had tremendous difficulty in fulfilling its fiduciary responsibility to ensure that proper control and accountability are maintained over each trust fund account. BIA's record has been so poor that OMB has classified its trust fund accounting as a "high risk" program.

Over the years, countless audit reports and internal studies have made numerous recommendations to correct the problems at BIA. These recommendations included developing written policies and procedures, periodically reconciling the account balances, arranging for periodic audits, providing periodic statements to account hold-

ers, and arranging for training of personnel. Your bill which has been introduced would put those recommendations in statute.

In our August 1992 testimony we said that OTFM, the office that does this work for BIA, could not correct all of its problems in isolation. There are too many other parts of the Department that also impact on it, so the cooperation particularly of MMS and the Bureau of Land Management is important to them.

We stated further that BIA needed to develop a comprehensive strategic plan for its trust fund operation, including interfaces with other systems. We don't just want to correct the reconciliation problem of today; we want to make sure that the reconciliation problem isn't a problem of tomorrow. That means that we have to have good information coming to BIA so that the reconciliations can be made easily, and not on a crash basis.

Let me talk a little bit about some of the improvements.

Since our testimony last August, BIA has made some progress. In January 1993, BIA issued an advance copy of its strategic plan for trust fund financial management improvement, and that's in two parts; there's a phase I and a phase II. Phase II is yet to be developed. Phase I talks to the improvements needed within OTFM; phase II would cover the other organizations at Interior.

Another thing they did was pay interest on MMS oil and gas royalty collections, which they distributed to account holders. These funds had not been distributed since 1985. The only account holders who did not receive distribution were the Navajos, and that's pending the Navajo Tribe's review of the computer program for distributing the income.

OTFM has also brought its fiscal year backlog of systems reconciliations—these are not account reconciliations—pretty much up to date. The trust fund general ledger accounts are being reconciled to the Treasury accounts and investment subsystem accounts. This is important, for accountants to make sure that the books balance, from a very global standpoint. The individual Indian money subsystem accounts are being reconciled to the general ledger at most area offices.

Also, in response to one of our recommendations, they contracted for a workload analysis of OTFM, and that was completed in November 1992 and presented to BIA.

Also in November 1992 BIA management created an Office of Special Projects to oversee the trust fund reconciliation project, and also to develop phase II of the strategic plan, which as I said covers the elements outside of OTFM that need to be in close cooperation with OTFM.

In March 1993, the Department directed the Office of Special Projects to focus its attention almost exclusively on the tribal reconciliation project, and mandated that the work be completed by March 1994.

Also, a team consisting of BIA, Department, and Intertribal Monitoring Association representatives was formed to explore settlement or other alternatives to reconciling the individual Indian money accounts, whose reconciliations were halted in February 1992, primarily due to missing records, and the potential costs of reconciling a large number of small accounts. To date, the team has had two meetings.

While there has been some progress, there are still a lot of problems that I want to bring to your attention.

One is that the implementation of phase I of BIA's strategic plan is on hold—that's the one which would address the problems within OTFM—until the new administration has had time to review and comment on that plan. Development of phase II of the plan is moving ahead slowly, partly because of the departmental directive to focus primarily on reconciling the tribal accounts.

OTFM prepared a reorganization plan after its workload study was done, but it has not been implemented because the Department is considering out-sourcing some of OTFM's functions included in the plan.

BIA management created the Office of Special Projects to oversee this reconciliation project, and reassigned six OTFM staff and $8.4 million to the office. As I said before, BIA established a timeframe of March 1994 for completion of the reconciliations, but this is probably unrealistic, given the volume of the records to be reviewed, and the time required to search for missing records. We're not sure that that's a realistic date.

In addition to losing staff to the Office of Special Projects, BIA has not filled certain key OTFM vacancies, such as the investment and accounting chief positions. As a result, OTFM has not been able to implement pilot tribal investment programs. Tribes have been expressing some concern about the implementation delays for these pilots.

OTFM has developed an inventory of the needed written trust fund policies and procedures, but the policies and procedures themselves have not been developed yet.

Since January 1993, the administration has moved slowly in making key BIA appointments. Neither the Assistant Secretary for Indian Affairs nor the position of Deputy Commissioner for Indian Affairs have been filled. In one case, the previous administration's Assistant Secretary is continuing forward, as you are probably aware, and in the case of the Deputy Commissioner, there is an acting person in that position. In addition, we have been informed that OTFM's Deputy Director has resigned effective June 23, 1993, leaving another key vacancy to be filled.

As I said in my opening remarks with regard to S. 925, I think the bill mandates many of the improvements recommended by ourselves, by the IG at Interior, and by certain internal studies. I won't go through and summarize that bill, as I'm sure that all of us here are familiar with it.

Actually, Mr. Chairman, the Department of the Interior has been responsible for performing most of the functions that are specified in S. 925 all along. I think you have an excellent recipe here for what needs to be done; the proof will be how well the administration carries out that recipe and goes forward with the initiatives.

I can't stress too much that adequate staffing, the filling of key positions, and the support of senior Department and Bureau managers are important elements to fixing BIA's trust fund problems. These problems took many years to develop—165, according to Senator Wellstone—and even with concerted effort, sufficient staffing and funding, and the strong support of Department and Bureau

management, the Congress, and OMB, these problems are going to take time to correct.

Mr. Chairman, I want to thank the committee for the opportunity to testify before you on our work. I would be happy to answer any questions you may have.

[Prepared statement of Mr. Crowley appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Crowley.

Just for the record, GAO's involvement in and investigation of the Indian Trust Fund and management is in response to official requests submitted by appropriate committees of the House and the Senate; is that correct?

Mr. CROWLEY. That is correct.

The CHAIRMAN. Second, we have been made aware—and I hope the information we received is not true, but sadly, I believe it is—that GAO has had great difficulty obtaining documents from the BIA related to individual Indian money accounts. Is that correct?

Mr. CROWLEY. Mr. Chairman, I would like to talk a little bit to that.

Last year we had worked out a pretty good working relationship with BIA in terms of sharing information and getting access to information. It was a good working relationship, and we had worked into that after a period of time. Since the beginning of this year, that relationship has changed somewhat. While we are getting some information, we are not getting all. There are still some documents that we have not been given.

I think the relationship could be much better. We need to work back to where we were last year, where there was more of a sharing of information that helped us do our work on behalf of the committees. I think there are ways in which we could be more interactive with the Department itself. It's much better if we have a handle on what's going on in an agency, if we share what our thoughts are with the agency while we do our work, rather than come up here and tell you what the problems are, and then they hear it for the first time in open testimony. I think it's a much better working relationship when they know what our thoughts are as we work along with them. I think that kind of working relationship ends up in a better correction of problems than having to raise everything up here.

But you are quite right, we have had problems. We have discussed it with top people at the Department and we've been assured that we will be getting the access that we want.

The CHAIRMAN. Are you saying that the situation has improved, but even at this moment you are being denied documents that you have requested?

Mr. CROWLEY. We haven't received certain documents, such as the biweekly reports from the reconciliation contractor. We've requested those and still have not gotten them.

What I'm also talking about, Mr. Chairman, are things like when there are meetings that are being held, it would be helpful if we knew about those meetings ahead of time so that we could attend them. In our role as monitor of this whole process, it's better if we can be involved firsthand—just from the standpoint of observing, not in trying to run these meetings, but in just trying to observe and see if we can get a good feel for what the problems are.

We really need to be on top of what's going on at the Department, and quite frankly, it hasn't been that way in the last 6 months or so. It was before, by the way.

The CHAIRMAN. Is this a deliberate refusal on the part of BIA? Or is it just an oversight on their part?

Mr. CROWLEY. Well, BIA has put out instructions that information has to be funneled through the Deputy Commissioner for Indian Affairs. That has become a bottleneck. If everything has to be coordinated through the one individual, all the documents and all the reports that we had previously been privy to, it will create a bottleneck.

The CHAIRMAN. A bottleneck or a coverup?

Mr. CROWLEY. I'll leave that to you to judge, Mr. Chairman.

The CHAIRMAN. You mean there are ingredients that could point to a coverup?

Mr. CROWLEY. I don't want to go as far as a coverup, Mr. Chairman. I think it's turned out to be more redtape for us than I think we need to have. I think we can have a much better working relationship with BIA.

The CHAIRMAN. In your investigation you have come across practices or activities that could be classified as being criminal in nature?

Mr. CROWLEY. No, sir; we have not. If we had, those would have been referred to the proper agencies for investigation and pursuit.

The CHAIRMAN. And the problems are due to what? Incompetence? Negligence? How would you characterize them?

Mr. CROWLEY. Are we talking broadly about the problems at BIA?

The CHAIRMAN. Yes; as Senator Wellstone pointed out, it has been going on for eons now.

Mr. CROWLEY. I believe that it's a problem in that we don't have sustained top level interest in resolving the problem. I think you have to have that. Right now we have an agency that doesn't have key positions filled, so how can you appropriately address a problem? You need to have your key people in place to address the problem.

I can speak only from our involvement, which has been for a couple of years, but we could see things where, for example, in the fall OMB made a major effort to see if it could bring emphasis to the Department of the Interior and BIA to correct this problem. We saw some progress that started then. That progress has lagged since the beginning of this year because you don't have top people in place to provide the necessary leadership, emphasis, and focus to correct the problems that are at hand here.

The CHAIRMAN. Is the OMB actively involved, as they indicated to this committee that they would be?

Mr. CROWLEY. OMB was actively involved in the fall. They have not been as actively involved since then. Some of the key players there, too, are just getting into place. In fact, one of the key players last year was Ed Mazur, who is the CFO for the Federal Government. I don't know if you were aware of this, but Ed Mazur has recently resigned to go to the Virginia State University.

So we still have this leadership void here that is a problem. Senator Wellstone pointed out the problem with regard to the systems

that we need to have in place and the architecture that will make this system work well. You need to have people in place for a period of time to get those kinds of architectures in place to produce good information for you.

The CHAIRMAN. There is no question in your mind, is there, as to the legal or moral or ethical role that we play as trustees? By law, we are trustees.

Mr. CROWLEY. By law, we are trustees. I don't think we've done a very good job of carrying out our fiduciary responsibility.

The CHAIRMAN. Well, it is frustrating, to say the least. We have had dozens of cases and incidents in which unbelievable decisions have been made, such as investing in a banking company that was on the verge of bankruptcy. It would seem that any casual investigation would have disclosed that.

How does this happen? Even a bank teller in the private sector would have found out.

Mr. CROWLEY. Mr. Chairman, you know, we have concentrated on the reconciliation problem, on getting the individual accounts straightened out. You're right, it's a banking operation. We are right now, at the request of the committee, looking at alternatives to the situation that we have at BIA. There are other institutions that could carry out this function for us.

Speaking frankly, and personally, not as a GAO representative, it seems to me that we have to have some serious questions as to the capability of the organization to actually get on top of this problem and fix it. It hasn't been done.

The CHAIRMAN. What would it take? Wholesale removal of personnel and replacing them with new employees? If this has been going on for 165 years, I think the time for change is upon us.

Mr. CROWLEY. We have to know what change to make, Mr. Chairman. Wholesale replacement—I can't recommend that at this time, but I can tell you that we are looking into better ways of carrying this function out, and we'll be making recommendations, or at least giving you information so that you can decide whether this would be the best approach for you to take.

The CHAIRMAN. My final question—I have many others that I would like to submit to you, sir, if I may——

Mr. CROWLEY. Sure.

The CHAIRMAN [continuing]. But we have been advised that the Department is considering transferring these responsibilities outside the Department before the accounts are reconciled. Have you heard that?

Mr. CROWLEY. Transferring them outside the Department before what? I didn't hear you.

The CHAIRMAN. To some other agency, or a private institution.

Mr. CROWLEY. Oh, another institution, such as the Fed, for example?

The CHAIRMAN. Before the accounts are reconciled.

Mr. CROWLEY. Those are some of the alternatives that we're looking into and some of the alternatives that are being considered, yes. I don't know that there's an active consideration on the part of the Department to actually carry out that transfer without input from the legislative branch.

The CHAIRMAN. Thank you very much.

Mr. Vice Chairman.

Senator MCCAIN. Thank you, Mr. Chairman.

Thank you, Mr. Crowley, and your staff, for providing us with this important information.

According to a report by the House Committee on Government Operations, they say that "Arthur Andersen & Co.'s fiscal year 1988 and 1989 financial audits of the trust fund confirm the historic weaknesses of BIA's accounting controls. These reports found that the accounting systems and internal control procedures utilized by the Bureau suffer from a wide variety of procedural weaknesses and other problems. Some of these weaknesses are so pervasive and fundamental as to render the accounting systems unreliable."

Do you agree with that?

Mr. CROWLEY. Yes.

Senator MCCAIN. Then shouldn't we look at some stark alternatives to what's been going on for the last 165 years? In other words, even if we saw some temporary improvements in the present system—which, according to Arthur Andersen, could cost as much as $250 million—shouldn't we consider some alternatives? For example, an outside institution managing these funds, or the tribes themselves being able to manage them after we have provided them with the capability to do so?

Mr. CROWLEY. Mr. Vice Chairman, let me just comment on a couple of things.

First of all, I'm not sure about the $250 million estimate by Arthur Andersen. I agree with Andersen's assessment of the accounting systems, but not necessarily the amount to fix it.

No. 2, I really don't like to tell you this, but there are other places within the Federal Government that don't have really good accounting systems. There are quite a few of them, as a matter of fact. It's a problem throughout the U.S. Government.

Senator MCCAIN. I don't disagree with that, but comparatively speaking, especially given the unique constitutional responsibilities that we have to Indian tribes, I would say that this is a little different. Would you agree with that?

Mr. CROWLEY. Yes; I would agree with that, yes.

All I can tell you, Mr. Vice Chairman, is that we are looking into alternatives to suggest to you. I think the biggest problem that I see at BIA has been the lack of sustained leadership to accomplish correction of the problem. This is not an easy problem to resolve; if it was easy, it would have been fixed years ago, no question about that.

What you need to have is sustained top level leadership to fix it, and we have not seen that here. It's primarily because we've had such a change and we don't have the key people in place right now. I think that's probably the reason why we haven't had the cooperation or the progress during this last 6 months.

Senator MCCAIN. Well, I'm not sure if it's exactly comparable, but I remind you that a few years ago we passed a bill that originated in this committee and was passed by the Congress, allowing tribes self-governance. I think you're basically familiar with it. Now some 30 tribes have voluntarily adopted the self-governance principle.

It seems to me that administration of their trust funds by the tribes themselves would be in keeping with that principle, not to mention the sovereign-to-sovereign basis on which we treat Indian tribes. So when you're recommending alternatives to us, I would hope that one of the alternatives you would examine as a possible recommendation would be empowerment of the tribes themselves to administer their own trust funds and moneys—with, of course, the appropriate oversight.

I'm not saying that that's an ideal solution, but I do suggest that the track record is so poor that it gives one little confidence that this existing bureaucracy can do the job. Do you see my point?

Mr. CROWLEY. Yes; I see your point.

Senator MCCAIN. So I hope you will give that consideration.

Now, who owns most of this trust fund? Is it eight tribes that own most of it?

Mr. CROWLEY. I think you are right. few large tribes account for most of the tribal trust funds.

Senator MCCAIN. So in some ways that does simplify the problem a little bit, when we're talking about the majority of the money belonging to just eight or nine tribes.

Finally, I know you're reluctant to respond, and understandably so, but again, along the lines of what the Chairman was asking, is there credibility to the charge that if some of this mismanagement were carefully examined, it could expose the Government to some liability suits? Do you have an opinion on that?

Mr. CROWLEY. My lawyer says yes. [Laughter.]

Senator MCCAIN. Well, I think that's all the more reason why we should get into this as deeply as possible.

We will look forward to your recommendations. By the way, when can we expect those?

Mr. CROWLEY. We are scheduled to be done in December. We can brief you in September.

Senator MCCAIN. But right now we're talking about around $2 billion?

Mr. CROWLEY. Yes; $2 billion is the amount, right.

Senator MCCAIN. And over time there obviously have been several other billions of dollars that have been either distributed or not distributed?

Mr. CROWLEY. Well, money flows through those accounts, so you have an in-and-out each year of approximately half a billion.

Senator MCCAIN. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Wellstone.

Senator WELLSTONE. Mr. Crowley, thank you very much for testifying and for the GAO work. It is much appreciated by all of us.

One question that I wanted to ask you because of something you said that sticks with me now, you said that there was a cooperative relationship up until about 6 months ago. What happened 6 months ago to change that?

Mr. CROWLEY. Well, there was a change in administration. I don't mean to imply that the change in administration necessarily caused it—well, it did in a way, because you had a change in leadership, and in fact we don't have some of the top positions filled,

either at OTFM or at BIA. So it's more of a leadership vacuum that is impeding progress at this point.

Senator WELLSTONE. And this is your point about filling these positions and getting, if you will, an infrastructure of management in place?

Mr. CROWLEY. You have to have a focus if you're going to get this problem solved. It's not going to solve itself by giving it part-time focus. You have to have the people in place with the power to provide that focus and to fix it.

Senator WELLSTONE. Have you met with Department of the Interior officials to appraise them of your findings?

Mr. CROWLEY. Yes.

Senator WELLSTONE. And what has their reaction been?

Mr. CROWLEY. Their reaction has been positive, the officials that are there. We still don't have an Assistant Secretary for Indian Affairs, but we have met with Bonnie Cohen, and she has been supportive. But we need to see some action as a result of that, too. She's been very interested and supportive of our position, so I would assume that we'd be getting more cooperation in the future.

Senator WELLSTONE. Mr. Chairman, yesterday I had an opportunity to meet with Ada Deer from Wisconsin, who has been nominated. I think she's quite committed to getting to work on these kinds of issues.

My first question—many of the questions have already been asked—I'm now trying to move above and beyond whatever the issue is; we really don't know what's involved here, except that it needs to be dramatically changed for the better. Trying to be more positive and talking about economic development for a moment, am I correct that very little of the trust moneys is actually invested in Indian land, Indian housing? To me, that's the flip side of this coin, which is what is done with this capital that is the capital of Indian people. Where has it been invested? My understanding is that actually very little is invested back.

Mr. CROWLEY. Senator, I'll have to get you some information on that.

[Information to be supplied follows:]

BIA INDIAN TRUST FUND INVESTMENT INSTRUMENTS

Mortgage-backed securities, including collateralized mortgage obligations [CMO's], such as: companion class CMO's and floating rate CMO's.

Farmers Home Loan Mortgage Corp. [FHLMC], such as: FHLMC guaranteed mortgage certificates, FHLMC adjustable rate mortgages [ARM's], FHLMC—seasoned discounts.

Federal National Mortgage Association [FNMA], such as: FNMA ARM's, FNMA 7-year balloon mortgage-backed securities [MBS's], FNMA stripped MBS's, FNMA MBS's, and variable rate mortgages.

Government National Mortgage Association [GNMA], such as: GNMA graduated payment mortgages and GNMA adjustable rate mortgages.

Money markets, such as: certificates of deposits, [CD's], collateralized CD's, Farmers Home Loan Bank discount notes, FHLMC discount notes/debentures, FNMA, Student Loan Marketing Association [SLMA], Treasury bills, U.S. Treasury securities, and zero coupon Treasury securities.

Other investments, such as: Farmers Home Administration loans, FNMA indexed sinking fund debentures, FNMA residentials, Financing corporation bonds, SLMA adjustable rate preferred stock, Tennessee Valley Authority bonds, World Bank bonds, Government trust certificates, medium-term notes, revenue bonds, and thrift mortgage-backed bonds.

Source: Bureau of Indian Affairs, Office of Trust Funds Management.

Mr. CROWLEY. We are involved specifically in looking at how we can get these reconciliations done and how we can get the accounts straightened out. We haven't yet reviewed the investment opportunities that are available.

Senator WELLSTONE. Mr. Chairman, that would be very helpful to me, and I think to other members of the committee, because it ties in with a question that Senator McCain asked when he talked about the ability of Indian people to be able to manage these funds. I think within the legislation one of the provisions you have is for demonstration projects whereby that management can be done by Indian people.

So I think it would be very helpful, if you wouldn't mind, for us to have that data available.

Mr. CROWLEY. We'll get that for you.

Senator WELLSTONE. My understanding is that very little has been invested back. I think that's a whole other issue, above and beyond some radical change that needs to take place in terms of how it's managed. We could see this become a tool of economic development if you could move to tribal management of the funds.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator MCCAIN. Mr. Chairman, could I just mention one thing?

The CHAIRMAN. Please.

Senator MCCAIN. I got the $250 million number, Mr. Crowley, out of this same report I was talking about. It says, "Arthur Andersen encountered substantial difficulties," et cetera. "Arthur Andersen estimated the audit of the 17,000 IIM trust accounts originally associated with"—you're familiar with that part of the report?

Mr. CROWLEY. Yes.

Senator MCCAIN. Anyway, they're saying that at the rate of $12.6 million, it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 BIA agency offices.

Mr. CROWLEY. Yes; in my statement I talked about how there are a lot of these accounts that maybe you don't want to audit, that maybe what you want to do is come to some agreement with the individual account holder as to what the amount would be, and make a settlement on it. We had a report issued last year that suggested that, primarily because there are an awful lot of these accounts that have very small amounts in terms of the transactions that flow in and out of them. Just to give you some gross figures, 95 percent of the transactions are under $500. One of our reports said there that about 80 percent of the transactions are under $50.

So in cases where you have the small ones, maybe there's a way in which we can reach some agreement with the account holders and the Department of the Interior on how much we will settle for on those accounts rather than trying to go back through many, many years, reconstructing land records and trying to find all of the supporting information. It may not be worth it.

Senator MCCAIN. In other words, of the 17,000 trust accounts, the overwhelming majority of them are very small?

Mr. CROWLEY. I think there's more than 17,000. That was the initial number if IIM accounts NTS received. It's 288,000 IIM accounts.

Senator MCCAIN. Oh, I see. That figure was just for three BIA offices. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Crowley, you indicated that one of the ways to cure the problem would be to fill the leadership positions. We have been advised that the Department and BIA have decided not to fill the top positions of OTFM because they might transfer responsibilities out of the Department into the private sector or somewhere else. Apparently they're taking this very seriously.

My question is, do you believe the accounts should be reconciled before any transfer of responsibilities goes forward?

Mr. CROWLEY. Well, what are we going to transfer forward? If we don't have good information to transfer to someone else, I don't see that we've solved the problem. We have the immediate problem right now—it's just like if you set up a new computer system. You must have clean data to go into it, otherwise you're going to have a lousy system afterwards, too.

The CHAIRMAN. Well, apparently the BIA or the Department has decided to act as a Pontius Pilate, and "wash its hands," of this matter and shift the responsibility to someone else.

Mr. CROWLEY. I can't respond for the Department.

The CHAIRMAN. So my question to you is, do you believe that the accounts should be reconciled, even if it takes a little while, before any transfer is considered?

Mr. CROWLEY. I think it's more than belief.

I'll answer your question directly: I believe that. But my lawyer just told me that by law, no transfer is permitted until the reconciliations have been made.

The CHAIRMAN. Will you repeat that?

Mr. CROWLEY. According to appropriations law.

This is Tom Armstrong.

Mr. ARMSTRONG. There is a provision in the BIA appropriations law each year that prohibits transferring the trust funds until the reconciliation is completed.

The CHAIRMAN. That is the answer I was looking for. [Laughter.]

Mr. Crowley, in response to a question from Senator McCain you indicated that you agree with Arthur Andersen's estimate, but not necessarily the view as to how to cure the problem. Could you elaborate on that?

Mr. CROWLEY. I think it was the opposite of that. I didn't necessarily agree with the estimate. There was some confusion as to whether it was $250 million to fix the problem, and to me, fixing the problem is also putting in new systems for making sure that we get good data from MMS, BLM, and others that input into this process, and that BIA has a good system for accounting for the information once it gets it.

I didn't necessarily agree with the $250 million estimate because I just don't have a basis for either agreeing or disagreeing.

I agree with Arthur Andersen's view of what the problem is. I think it's just the opposite of what you said.

The CHAIRMAN. All right.

We have been advised that there is a strong move to allow the statute of limitations to run against the claims of account holders for mismanagement of their funds. What is your view?

Mr. CROWLEY. You're talking about the tolling of the statute of limitations?

The CHAIRMAN. Yes.

Mr. CROWLEY. We've already come out against that, because it doesn't make any sense to toll the statute now if we have reconciliations ongoing.

I've never quite understood what "tolling" meant, so my lawyer is helping me out here.

What we want to make sure of is that the statute of limitations remains suspended until the reconciliations have taken place.

The CHAIRMAN. In other words, we want to keep the trustee responsible?

Mr. CROWLEY. Absolutely.

The CHAIRMAN. I agree with you wholeheartedly, sir.

And we thank you very much for your testimony this morning. We will be submitting additional questions and will await your response. Thank you very much.

Mr. CROWLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Our next panel consists of the Chairman of the Intertribal Monitoring Association on Indian Trust Funds of Browning, MT, Elouise C. Cobell, and the counsel to the BIA Reorganization Task Force, a member of Monteau, Gunter & Decker of Great Falls, MT, Harold Monteau.

Ms. Cobell, welcome.

STATEMENT OF ELOUISE C. COBELL, CHAIRMAN, INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS, BROWNING, MT, ACCOMPANIED BY EARL OLD PERSON, TRIBAL CHAIRMAN

Ms. COBELL. Mr. Chairman, members of the committee, on behalf of the Intertribal Monitoring Association on Indian Trust Funds, I am very grateful for the opportunity to appear here today to support S. 925, the Native American Trust Fund Accounting and Management Reform Act of 1993.

With me today I have my tribal chairman, Earl Old Person.

I am the chairperson of the Intertribal Monitoring Association; the comptroller of the Blackfeet Tribe of Montana; a director of a nationally chartered commercial bank, and an individual Indian account holder. In all of these capacities I have had occasion for many years to observe the administration of the Indian Trust Funds by the Department of the Interior, and I am here today to support the bill strongly and to urge its enactment.

Title 1 of the bill would correct the enormous injustice that has been deliberately perpetrated on hundreds of thousands of individual Indian account holders by the Department of the Interior through a number of administrations. In the mid-1980's, through a series of unfortunate circumstances, the BIA lost several millions of dollars, resulting from investments in financial institutions that subsequently failed, and in at least one instance, an investment in an institution that turned out to be a totally bogus institution.

In June 1985, the cash management officer for the BIA testified in a deposition that the Bureau, for reasons of administrative expedience, credited all the funds received back from these institutions or their insurers to tribal accounts first, and then to irrigation and

power accounts, with the shortfall being allocated to the pool of IIM accounts. The Comptroller General of the United States ruled that the Government is not required to pay interest on these IIM accounts.

Strictly as a legal matter, the Government is off the hook for any liability for the interest lost by individuals through the Bureau's unwise internal practices. There is no doubt in anyone's mind that had the Bureau allocated the losses instead to the tribal accounts, that the Congress may have acted immediately to require that the accounts be made whole. The hundreds of thousands of individual Indians whose money make up the IIM pool have been allowed to remain nameless, faceless, and uncompensated for the losses so allocated to them.

Title 1 of S. 925 would correct this obvious injustice that no administration has so far addressed, even though the previous administration testified to Congressman Synar's subcommittee that the Government clearly had a moral responsibility to make these individual Indians whole.

Title 2 of this bill would direct the Secretary to administer Indian trust funds in a manner that promotes the economic development of Indian communities. We are particularly pleased to note that this title does not purport to specify the money management approaches that tribes may choose to adopt, but rather leaves this choice up to the tribes themselves to work out with the Secretary, and directs the Secretary to approve a tribal trust funds management plan that meets basic standards of prudence and that is acceptable of appropriate oversight in the exercise of the Secretary's trust responsibility.

We also note that this title does not require any tribe to adopt such a plan, but merely authorizes those tribes who choose to do so to take a far more active role in the administration and management of their own wealth, and requires the Secretary to cooperate with their efforts.

We think it is important to point out here that the provisions of titles 3, 4, and 5 are critically important for the protection of Indian account holders. The bill provides guidance for the Secretary and standards against which to measure his performance, but it does not take the Secretary out of the Indian trust fund business. It will continue to be necessary for the Secretary to develop and maintain the capability to oversee the management of these funds, and this cannot be accomplished without appropriate attention to both the number and the caliber of employees entrusted with these responsibilities.

We have suggested that the bill be amended to make clear that tribes will be free to develop their own trust fund management programs for only a portion of the funds presently managed by the Bureau, should they choose to do so. In a similar vein, we believe that the bill should make it clear that tribes have the option of placing their funds back under the management of the Bureau should they choose to do that.

It occurs to us that there may be a number of reasons why tribes might choose to place funds back into the control of the Bureau while they revisit their own strategies, evaluate the performance of their own plans, or even to take advantage of less costly adminis-

tration. We have amendments, and we are willing to work with the committee on these particular amendments.

I am not going to devote any more time in my oral presentation to the provisions of the bill because we feel that it is an excellent bill. Instead, I would like to devote some of my time to talking about the ability and unwillingness of the Department to implement legislation similar to this.

I would like to start by pointing out briefly a number of matters that we believe need to be brought to this committee's attention.

We met with members of this committee in November of last year and assured you that we had developed a cooperative, partnership-like approach with the previous administration to work on a number of issues that are addressed by this bill. We regret to inform the committee today that the partnership we described to you at that time has since been completely dissolved. We fear that the historic reconciliation of tribal accounts is proceeding in a manner that is not consistent with the procedures largely agreed upon last fall. We cannot be entirely sure, because we have been denied access to information and periodic reports that would be required in order for us to perform the necessary monitoring of these activities on behalf of the tribal account holders.

The office to which Congress has appropriated significant sums of money to provide oversight and direction to this effort has been administratively removed from the activity altogether, and the office set up to oversee this activity is proceeding, we fear, without adequate resources or qualified personnel to do the job properly. Both this reconciliation effort and the daily operations of the Office of Trust Funds Management are being micromanaged by Washington-based officials who could never be hired directly to do what they are accomplishing indirectly.

Under the guise of administrative supervision of these field installations, both offices are under gag orders imposed by the Deputy Commissioner which prohibit them from sharing information with us in a timely manner. The Office of Trust Funds Management is under instruction not to fill any of the positions of chief of the Investment Division, notwithstanding that hundreds of millions of dollars of investments are executed weekly in that office. We are greatly concerned that this committee not be misled by the initiatives that the administration will describe here today.

We believe that unless and until these attitudinal issues are addressed personally and forcefully by the Secretary and by the Director of OMB, there is precious little prospect of successful implementation of this S. 925 or any other measure designed to improve the management of the Indian trust funds.

Every hour that we have spent addressing trust fund issues, we have spent 10 or 20 fighting off the bureaucratic roadblocks.

I would like to talk to you and ask you a few questions about what I have dealt with in my mind in dealing with the Department in the last few months.

As we heard today, it has been 165 years of mismanagement. We felt that we had worked out a partnership where we could work with the Department to resolve a lot of these issues. In the last few months I have been struggling with this: If the Department is so willing to resolve the problems, why did the BIA, in its fiscal year

1994 budget request, propose to delete appropriations act language that tolled the statute of limitation on claims by account holders until the reconciliation is complete? Why did the Department allow to be created a new, illegal office—in my opinion— when the Office of Trust Funds Management had the blessing of Congress, the tribes, the Intertribal Monitoring Association, and the Reorganization Task Force? Why were the Intertribal Monitoring Association and GAO cut off from all the information involved in the reconciliation and the monitoring of improvements to the Office of Trust Funds Management?

Why is the Department going forward with the idea of moving the Office of Trust Funds Management to the Federal Reserve, when we have agreed that there should be an indepth analysis done first? We are concerned about the capabilities that the Federal Reserve would have in managing our trust funds. We are worried that such a move would take trust funds one step further away from the Indian people, to an office they have no experience in accessing. We believe any changes in the Office of Trust Funds Management should be furthering self-determination, not inhibiting it.

We believe that the GAO study should be done and started in unison with the tribes through the Intertribal Monitoring Association, but that the legislation that is being proposed today should not be held up until this factfinding mission is done.

Another "why" that I've been dealing with is, why, in the private sector, people are fired for actions, but within the Government system there is no retaliation or no reprimand for top-level bureaucrats who continue to disregard Congress' laws and disregard tribal input?

I know I probably sound a little frustrated today, and it is because I am very frustrated. I believe that the tribes, the Indian people, and the individual account holders can no longer tolerate the unwillingness of the Department to work with the tribes and with the Congress to correct this terrible mismanagement.

With that, I would like to ask the committee to please set up a meeting with Secretary Babbitt to address some of the issues that I have outlined today. I know that Secretary Babbitt has put this as a No. 1 priority, but somehow it doesn't seem to be trickling down to the other bureaucrats. I would like to ask you, Mr. Chairman, if you could give that some thought, a meeting with the Secretary to try to get these things addressed.

With that, I would like to close, and I thank you very much.

[Prepared statement of Ms. Cobell appears in appendix.]

The CHAIRMAN. Thank you very much, Ms. Cobell. First, may I thank you for your suggestions and amendments, and my staff most certainly will be very pleased to work with you to study your proposal.

Second, as to the questions you have posed in your statement, the "whys," I will be asking a BIA spokesperson who will be testifying here the same questions, so I would suggest that he be prepared.

Third, I am in the process now of arranging a one-on-one meeting with the Secretary, with no one else. I will most certainly share

with him my thoughts and the findings that we have as of this moment on this matter.

Ms. COBELL. Thank you.

The CHAIRMAN. Now may I call on Mr. Monteau.

STATEMENT OF HAROLD MONTEAU, OF MONTEAU, GUNTHER & DECKER, P.C., GREAT FALLS, MT, COUNSEL TO THE BIA REORGANIZATION TASK FORCE

Mr. MONTEAU. Thank you, Mr. Chairman.

I thank the committee for the opportunity this morning, and I ask the committee's indulgence for not submitting a written statement previous to the meeting. I would like to reserve the opportunity to submit a written statement after this week. There will be a series of meetings this week on this particular subject.

[Prepared statement of Mr. Monteau, to be submitted, not available at time of printing.]

Mr. MONTEAU. In terms of the partnership that Elouise described that we put together last year with your assistance—and I again thank you for your assistance in bringing together the Federal agencies last year with the tribal representatives to address this subject—I think after that particular meeting, in which Ed Mazur and the folks from OMB and BIA, the Department, Minerals Management Service, BLM, and the tribal representatives were there—after that particular meeting we had a period of time when we truly felt that we did have a partnership arrangement and that we were going to go forward with the strategic planning process for the Office of Trust Funds Management.

Unfortunately, I have to inform you today that our sentiments in terms of the Task Force on BIA Reorganization are the same as the ITMA's. We are wondering what has happened to that partnership in the last 6 months. Unfortunately, I think there may have been a little bit of political paranoia that was involved when the new administration came in the door and viewed some of these initiatives as Republican initiatives. In fact, these initiatives were tribally based initiatives. When I talk about those, I talk about both the effort of the ITMA and also the effort of the task force to try to reorganize the Bureau of Indian Affairs.

Hopefully, the message is getting through to these folks that what we have here are some popular initiatives, a true partnership approach that we felt was ongoing and needed to be continued, and that they will make an honest and sincere commitment to begin to work with us again to take care of some of these problems.

I was quite pleased this morning that the people from GAO mentioned the leadership factor. Yes, we do need to get on with the ball game here and not only get the top level positions hired in the central office of the BIA, but we also need to start in earnest to put together the team for the Office of Trust Funds Management. I was very displeased to hear that one of the top people that we had managed to—when I say "we," I talk about the tribes and the BIA—that we had managed to attract to the Office of Trust Funds Management has quit in frustration. I guess we really can't blame her. She was coming into an organization that looked like it was going to be going somewhere, because there had been a strategic plan developed for that office. There had been some strategies de-

veloped for pulling that office up by its bootstraps. Then, once she walked in the door, she started to see that effort dissolve away—in fact, physically dissolve away in terms of what was happening with this Office of Special Programs, the Special Projects Office.

I would ask the committee to direct the Bureau of Indian Affairs today that they are to cease the operations of that office if and until it is put into place in a legal manner. I don't believe that the manner in which the Bureau and the Department put that office together since November complies with the law, and I don't even think that it complies with their own internal regulations or their own internal processes for putting such an office together. I think it's really a shame that the tribes supported the increased financial resources and the increased positions so that the capabilities of the Office of Trust Funds Management could be brought forward, only to find out that they are now being drawn away and placed into this Office of Special Projects. I think these folks should be told to put those resources back where they can be utilized properly.

I think the tribes do understand the sentiments of the administration and this sort of knee-jerk reaction that we have witnessed, not only recently but also over the last two administrations, that the solution to this problem is to shove it aside and put it somewhere else besides the Bureau of Indian Affairs. We know that that is not the solution. The solution will come from Indian country; I said that last year when I appeared before this committee on the same subject, that the answer to what we're talking about here and the issues that we're talking about here is self-determination, self-governance, as Senator McCain talked about this morning. What we're talking about in this bill is something that is similar and keeps with the principles of self-determination and self-governance, and that is that eventually the tribes should be able to manage their own money; they should be able to impact in terms of the investment decisions that are made. This money should be out in Indian country, working for Indian country, and it isn't. Senator Wellstone asked a question about where these dollars are invested. The answer is that they are not invested in Indian country. This actually huge economic development clout that the tribes have is not being invested in Indian country.

The provisions in the act, and also some of the provisions of——

The CHAIRMAN. Mr. Monteau, may I interrupt at this point?

I have just been advised that a measure in which I am involved is now pending, and I have been called by the leader to return to the floor. So I will call a short recess, subject to the call of the Chair.

[Recess.]

The CHAIRMAN. My apologies. It took a little longer than anticipated.

May I call upon Mr. Monteau to complete his statement?

Mr. MONTEAU. Thank you, Mr. Chairman. I will try to summarize briefly here so that we have some time for questions that you may want to ask Elouise or me.

As I was saying, each successive administration has had kind of a knee-jerk reaction to this problem. The reaction has been to try to shove it away and either send it to the private sector or to another Federal agency. But at the same time, as time goes on, there

is a realization that they cannot shove it off on anybody until it is fixed.

I think that the present administration is probably in the throes of learning that particular principle right at the moment.

Again, I think the tribes do agree that, yes, this trust fund management function should eventually be moved out of the Bureau of Indian Affairs, but it should be moved in a manner in which the tribes are the major managers; and if not the tribes themselves, then institutions, either on a local or regional basis, that are of the choosing of the tribes.

Again, reiterating what Elouise said earlier, the Tribal Task Force on BIA Reorganization is at a loss to explain the aversion that the present administration seems to have with tribal consultation and the participation of tribes in the fixing of some of these issues. We hope that this mindset is temporary and that we can make some headway, maybe even this week, in convincing the new administration and the people who work in it that the tribes have some very meritorious things to say and do have a contribution to be made in fixing some of these problems.

The problem will not be fixed and the issues will not be addressed properly until we do have a commitment. When I talk about commitment, I talk about commitment to some of these solutions that we've worked on over the last couple of years. Although the Strategic Plan for Trust Fund Management was not a perfect document, and I think everybody admitted that it wasn't, it did come about from a process where the tribes were sitting down with those Federal agencies and coming up with a strategy for starting to make the improvements in the Office of Trust Funds Management.

If anything happens in the next few months, I would hope that one of those things would be that the Office of Trust Funds Management be allowed to go forward with some of the principles that are outlined in that strategic plan, especially in terms of building the capability of the staff down there. I think the first requirement for doing that is going to be to get that staff and get those dollars and functions and authorities back, out of that Office of Special Projects, and put them back where they belong in the Office of Trust Funds Management and allow the Office of Trust Funds Management to go forward with hiring those key positions and hiring the other personnel that they need in order to carry out their responsibilities.

I would anticipate that somewhere down the road we are going to see something that is similar to what we see in the Office of Self-Governance. Senator McCain mentioned it this morning. Perhaps that's what we need to be thinking about, some sort of proposal or scheme where trust fund management is not moved completely out of Interior or out of the Bureau, but perhaps needs to function a little more autonomously from the present Bureau system. I think that Elouise and the ITMA have been kicking around some ideas on that type of structure, and perhaps she can talk to you a little more about that later.

Any resolution of the issue, of course, must be accompanied by addressing the issue of the IIM accounts. Actually, the IIM account issue is a harder issue than the tribal accounts, and as a precursor

to any movement there, I think that we do have to give notification to those account holders of the status of their account as the information sits now. I realize there is some reluctance on the part of the Bureau to giving out unadjusted statements. There was some talk that this would be followed by a massive filing of lawsuits against the Bureau. I don't necessarily think that's the natural consequence. I think if you put the account statements out there and you provide the proper counselling at the agency level, or a team goes out and provides the recipients or the account holders with the proper counselling with regard to the correctness or with regard to any mistakes that might be evident in those accounts—and then, of course, provide some sort of settlement process—that's what is going to go a long way toward resolution of this problem.

I'm not just talking about the pilots. The pilot agencies are a good start, but I think it has to be done bureauwide and nationwide.

Right now, I fear that the OTFM is set up for institutional failure, or has been, at least, in that we should not sit back and tolerate this jerking around of the tribes and of the Bureau in terms of the resolution of this issue. I think the plans are in place; the plans can proceed, and they should proceed posthaste.

I kind of liken this situation to what I try to pull with my wife in terms of our bank account. After I've got it pretty well messed up and I've used my cash card while I'm on the road and forgot to give her the receipts, or put the receipts in my car, or put them in my desk, and my deposit receipts may end up the same way, and the bank is calling me, I give her the checkbook back and hope that she can straighten it out.

I don't think we should hand the checkbook over to the Federal Reserve or any other Federal agency, or even to a private industry institution, until we have the checkbook balanced. I don't think the tribes should be asked to assume the problem either until the checkbook is balanced.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Monteau. Your statement is most helpful.

In its prepared statement, the BIA proposes that further action on S. 925 be set aside until GAO has completed its study. Do you have any thoughts on that?

Mr. MONTEAU. I would have to say that there is a plan that is in place right now. The Task Force on BIA Reorganization, the ITMA, both committees, the Appropriations Committees on the House side and the Senate side, and the Secretary—in the previous administration, at least—have endorsed that plan for reorganization of OTFM. As far as we are concerned, there should be movement on that particular plan until somebody else proposes something concrete and substantive that is different and can be acceptable to the tribes. Right now, that particular plan, that particular initiative that we talked about earlier, is the plan that's on the table. Why should it not go forward? Why all of a sudden should we start to embark on something that's going to set us back another 12 to 18 months when there is something on the table right now?

The CHAIRMAN. I am referring to the bill that we are considering. Should that be set aside?

Mr. MONTEAU. I don't necessarily think the bill should be set aside. I think the bill should go forward. I think it comports with what the ITMA has recommended. It comports with what the task force has recommended. In fact, one of the basic principles of the task force is evident in this bill, and that is movement of authority, movement of resources down to the local level, down to the agency level. Put the authority there, put the functions there, let the tribes move forward, and at some time in the future assume the responsibility for their own dollars.

The CHAIRMAN. Thank you, Mr. Monteau.

Ms. Cobell, do you feel the same way?

Ms. COBELL. Yes; I do. I think that the GAO factfinding mission might take a considerable amount of time. There is no reason to hold up this bill. It can go forward.

The CHAIRMAN. Ms. Cobell, Mr. Monteau, thank you very much.

Our next witness is the chairman of the Red Lake Band of Chippewa Indians of Cass Lake, MN, Hon. Gerald Brun.

Mr. Chairman, welcome, sir.

STATEMENT OF GERALD F. BRUN, CHAIRMAN, RED LAKE BAND OF CHIPPEWA INDIANS, CASS LAKE, MN

Mr. BRUN. Good morning, Mr. Chairman. I am the duly-elected chairman of the Red Lake Band of Chippewa Indians, and I am here in support of S. 925.

You just asked the other gentleman if we should move forward. If we waited for the Bureau to move forward or recommend moving forward, you would never move. That's been the history of the Bureau, not moving forward.

I will be very brief, Mr. Chairman, in my statement. My written statement is self-explanatory, so I'll jump right to what I think should be changed on the bill.

I will read the last paragraph here, on page 6.

> We are concerned that title 5 deals with BIA accountability in the future, after October 1, 1993. We understand the importance of this provision. But before the future is fixed, we have to address the past. We are alarmed at what has been taken from us up to this time and do not trust that the BIA audit through Arthur Andersen will fix the problem for us. At the very least, we ask that you amend section 501(c) so that each tribe may contract for BIA funds under P.L. 93–638 authority so that the tribe can hire its own independent auditor to audit the BIA's handling of the tribe's and its members' trust funds.

That's what Red Lake is doing right now. We have a 638 contract. But I would like to see it in writing in this bill, where it is explicit that we have the authority to do just that, and that we can move forward. Once the audit is reconciled with the tribe, there should be some system where the band would get paid off if they have something coming, or would find a way to pay back the Bureau if they had something coming, which I doubt.

In our case, in 1981 we realized that the Bureau was spending our money without our approval, either spending it or misplacing it. So we went to court, and the judge ruled that the Bureau should hire an independent auditor, which they did, the Bailey audit firm, which is what they called it, and after that audit they found that from 1968 to 1984 they were $849,000 short of what was supposed

to be in our trust funds. So that's why we're having the independent auditor from 1984 to present.

The Bureau seems to be dragging its feet. It seems to be holding up on the papers in whatever way they can.

So with that, I will be open to any questions, Mr. Chairman.

[Prepared statement of Mr. Brun appears in appendix.]

The CHAIRMAN. So it is your view, Mr. Chairman, that this bill should proceed forward and not be held up until the GAO finishes its report?

Mr. BRUN. You bet. Move on. Don't wait.

The CHAIRMAN. Has your tribe ever received annual reports on the account?

Mr. BRUN. We get these big, long sheets that show how much you have in each account. It's not what you'd really call a report, but it shows how much you have in each account.

The CHAIRMAN. That is all?

Mr. BRUN. That's all.

The CHAIRMAN. Well, Mr. Chairman, let me assure you as chairman of this committee that everything will be done to make certain that this measure passes.

Mr. BRUN. Thank you.

The CHAIRMAN. Thank you, sir.

Our next witness is Prof. Martin Whitman of the Yale School of Organization and Management, and president of Whitman, Heffernan, Rhein & Co., Inc., of New York.

Professor, welcome, sir.

STATEMENT OF MARTIN J. WHITMAN, PROFESSOR, YALE SCHOOL OF ORGANIZATION AND MANAGEMENT, AND PRESIDENT, WHITMAN, HEFFERNAN, RHEIN & CO., INC., NEW YORK, NY

Mr. WHITMAN. Good morning. Thank you for hearing me.

You have a copy of my written testimony, and I don't intend to just read it. I would just make a few comments.

The CHAIRMAN. Your full statement is made part of the record.

Mr. WHITMAN. I will briefly just add to the three issues I talked about in my statement. One is to standards; two is to self-determination as outlined in the bill; and three is to job training.

Let me preface what I'm going to say with this. Much of my background in native American affairs has been as a consultant to the Blackfeet National Bank. It is a very successful, well-financed small commercial bank, owned mostly by the Blackfeet Tribal Council.

In terms of standards, which really has to do with the administration and custodianship of funds, I think the resolution of the problems ought to be less complex in this back office matter than it has been made out to be, certainly by the Bureau of Indian Affairs. In my experience there has been, certainly in the last 5 years, a computer revolution which permits appropriate handling of small accounts, these IIM accounts, and something could be worked out. Admittedly, they are not all securities; there's oil and gas, and timber, which are somewhat harder to handle than cash and securities, but nonetheless, there is a large number of people that very, very efficiently handle small accounts. We recently acquired the

Home Fed Trust Co. in San Diego; I don't know how many tens of thousands of small accounts they have. One of the reasons we bought them is that their statements are out the 8th of every month, and they don't make errors. That's what our due diligence showed.

Perhaps the fastest-growing—I don't have any question that the fastest-growing financial industry in the United States has been companies registered under the Investment Act of 1940. Those companies handle small people, and they are just paragons of efficiency in terms of the administration and custodianship of funds. There is great competition for the business.

I think native Americans can slowly take over their affairs fully, and certainly they can be in a position, depending on the types of investment, to get the best possible subadvisers. For example, insofar as tribes are to make passive investments, that's a pretty easy function for home-grown people to take over the management of their own affairs. As far as making targeted investments on reservations or minority enterprise/small business investment companies, I think that given control of funds—more than "think;" I've spoken to some people—they can get as subadvisers some of the most successful people doing such investing, and they can increasingly take control of their investments.

Finally, I have had some conversations with the powers that be at the Yale School of Organization and Management, and they certainly have a strong interest in implementing a program of education for financial people and management people in tribal councils.

Thank you for hearing me out, and I would be pleased to answer any questions.

[Prepared statement of Mr. Whitman appears in appendix.]

The CHAIRMAN. Professor, I thank you very much.

In your vast experience and background have you ever come across any private trust funds that do not provide monthly statements or which do not meet the standards that are set forth in this bill?

Mr. WHITMAN. No; I have not, and that would go to the banking industry, the broker/dealer industry, or the investment company industry. I think it would be illegal in any of those three industries to not reach a standard of appropriate and timely reports that are accurate.

The CHAIRMAN. And do you believe it would be expensive to meet these standards?

Mr. WHITMAN. My experience is in securities and cash management. The answer is "no." I had better not respond about natural resources. I don't know.

The CHAIRMAN. In other words, it is attainable?

Mr. WHITMAN. Oh, yes. Oh, yes.

The CHAIRMAN. Other banks and trust funds do maintain these standards?

Mr. WHITMAN. My goodness, Morgan Guaranty used to run these great advertisements that they would take care of your art collection at a reasonable fee. I would suppose that timber and oil and gas and things like that might be easier, or land management.

The CHAIRMAN. And you firmly believe, as you have indicated, that tribally owned and controlled financial institutions can manage these trust funds?

Mr. WHITMAN. Of course. Of course. I would have no question specifically that Blackfeet National Bank is in a position today to get subadvisers and become the manager of record of many of these funds. Furthermore, given enough time, I don't think Blackfeet National Bank would need a subadviser.

The CHAIRMAN. Thank you very much, sir.

Now may I call upon the Acting Deputy Commissioner of the Bureau of Indian Affairs, Woodrow Hopper, who will be accompanied by Donna Erwin, Deputy Director, Office of Trust Funds Management of Albuquerque?

Mr. Hopper, welcome, sir.

STATEMENT OF WOODROW HOPPER, ACTING DEPUTY COMMISSIONER, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY JIM PARRIS, DIRECTOR, OFFICE OF TRUST FUNDS MANAGEMENT, ALBUQUERQUE, NM; DONNA ERWIN, DEPUTY DIRECTOR, OFFICE OF TRUST FUNDS MANAGEMENT, ALBUQUERQUE, NM; AND HARRIET BROWN, LIAISON OFFICER

Mr. HOPPER. Good afternoon, sir. I am Woodrow Hopper, the Acting Deputy Commissioner of Indian Affairs, and I would like to introduce my colleagues with me today.

To my right I have Jim Parris, who is Director of the Office of Trust Funds Management in Albuquerque. To my immediate left is Donna Erwin, the Deputy Director of the Office of Trust Funds Management in Albuquerque, and to my far left I have Harriet Brown, who is the liaison that works in my office. She is the liaison officer between the Albuquerque office and my office.

Mr. Chairman, I have a very brief prepared statement that I would like to present this morning. I would also like to enter it for the record. It is brief, and we can get right to the questions.

Mr. Chairman and members of the committee, I am here today to discuss S. 925, the Native American Trust Fund Accounting and Management Reform Act of 1993. This bill, as you indicated, is the companion to H.R. 1846, introduced by Congressman Synar in April of this year.

As the committee is aware, reconciliation of the Indian trust fund accounts and the development of a policy for future trust fund management are among the most visible issues facing the Department of the Interior and the Bureau of Indian Affairs. The Department and the Bureau of Indian Affairs have made improvement of Indian trust funds management a high priority.

We are continuing with Arthur Andersen & Co. in the reconciliation of tribal trust accounts and development of automated trust systems reconciliation pursuant to the method jointly developed by the Department, OMB, and tribal representatives. In addition, the committee should be aware that the Department's individual Indian moneys study team is meeting to develop an acceptable, cost-effective approach by September 30, 1993, for reconciliation of the IIM accounts.

In testimony before the committee on January 25, the Secretary questioned whether the BIA should be devoting substantial resources to developing a capacity for funds management that already exists today, both in other Federal agencies as well as in the private sector. Since that time information from tribal representatives, congressional staff, OMB, and other interested parties has led the Department to conclude that we should thoroughly explore whether the Indian trust funds management functions should be transferred out of the Department.

Representative Michael Synar's recent request of March 11 to the GAO to conduct an indepth review of transferring Indian trust funds management from the Department of the Interior provides an excellent basis and a vehicle for this dialog. As you know, that review is designed to study the various alternatives to the BIA that exist both within and outside the Government, and report back to Representative Synar on the findings. We expect that the GAO analysis will provide parties—and particularly the tribal representatives—with an expert, objective analysis that will serve as a basis for a decision most beneficial to the interests of the account holders.

Let me now turn to the proposed legislation, S. 925.

We recommend that enactment of any legislation await the completion of the GAO study and the conclusions of the Congress, the tribes, and the Department resulting from that study. Obviously, the substance of legislation could vary significantly, depending on the recommendation as to the agency to be performing the management, and the views of that agency.

We will work with you at that time to develop the appropriate legislation which could, of course, encompass significant elements of S. 925. At this time we would prefer not to provide specific comments on S. 925.

I will, however, speak briefly to the concept of demonstration projects. The Department supports demonstration projects that enhance Indian self-determination and promote Indian economic development. The concept of demonstration projects has been an integral part of the Bureau's improvement plans for Indian trust funds management. In fact, the Bureau has an initiative for local/regional investment demonstration projects well underway and would be pleased to work with tribes in selecting other suitable demonstration projects.

We recommend that any legislation provide the Secretary with broad discretion as to which programs and the number of demonstration programs to be authorized at a given time. Also, in any legislation the term "tribe" should be defined as federally recognized tribe.

Thank you, Mr. Chairman. This concludes my prepared statement. We would be happy to respond to questions you may have.

[Prepared statement of Mr. Hopper appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Hopper.

Ms. Erwin, do you have a statement?

Ms. ERWIN. No; I don't.

The CHAIRMAN. Mr. Hopper, as you sat through the hearing you heard that a directive was issued by the Department on informa-

tion relating to the matter before us, and one of the witnesses characterized this as a gag rule.

I have been told that you are the person responsible for this directive on sharing information with the GAO and the Intertribal Monitoring Association. Is that correct?

Mr. HOPPER. That is not correct. You have been misinformed.

The CHAIRMAN. Who is responsible for that directive?

Mr. HOPPER. There is no gag order to GAO.

The CHAIRMAN. Then why is GAO suggesting that they have had difficulty getting information from you?

Mr. HOPPER. There seems to be a misunderstanding with a memorandum that came out around the end of March, under the individual that I replaced as the Acting Deputy Commissioner. In that memo the then–Acting Deputy Commissioner asked that all documents that were going to be moving out of the Office of Trust Funds Management be reviewed by the central office before they go to any outside agency. There was no intent in that memo to restrict GAO or any other organization to access to any document that we know that they have the right to have and will ultimately receive anyway. The intent of that was to try to make sure that there were no draft documents that were going to be moving around outside of the organization where major policy decisions had not been reviewed and made by the officials within the Department and the Bureau of Indian Affairs.

The CHAIRMAN. After such review, has the GAO been given access to these documents?

Mr. HOPPER. It was my understanding—and I've had conversations with Gayle Condon of GAO, about 10 days to 2 weeks ago, to try to clarify the matter—I was rather surprised this morning when Mr. Crowley indicated that they were still having trouble getting access to documents. I've had discussions with the individual who is managing the special projects team, as well as Mr. Paris, who is Director of the Office of Trust Funds Management, to clarify my position on release of information to GAO and ITMA. My position is, make everything available to them, period.

The CHAIRMAN. In the President's budget request for fiscal year 1994, the Interior Department has asked Congress to delete language which was put into the appropriations act relating to the statute of limitations on causes of action against the department for the management of Indian trust funds. If this request was granted, it would effectively wipe out any cause of action that the account holders may have if the reconciliation study turns up errors by the BIA.

Why was this request made?

Mr. HOPPER. My understanding is that that in fact is not the case, that by removing the language it would not remove any rights that individuals would have to any future claims.

The CHAIRMAN. I think you had better ask your lawyers on that.

Mr. HOPPER. I did.

The CHAIRMAN. And your lawyers said it doesn't affect the cause of action or remedies?

Mr. HOPPER. The individuals would still have the right to file the claim, based on when the error was discovered. So the statute of

limitations—they would still have a period of time that they could file the claim.

On the positive side of this one also is that we do have money in the budget for 1994 to cover those losses. And you also indicated a couple of weeks ago, I believe, that you were going to put the language back in, regardless of what our position was on it.

The CHAIRMAN. What we can't understand is this: If it doesn't affect the cause of action, as you have indicated, why did you propose this?

Mr. HOPPER. I personally did not propose it. What I attempted to do was find out the reasons for why the language was proposed to be removed.

The CHAIRMAN. In November 1992, the Office of Special Projects was created by officials of your Department. In the creation of this office, they transferred staff and dollars from the Office of Trust Funds Management to the new office. The committee has a memo from the director of that office indicating that it was knowingly created in violation of Department regulations.

In addition, the Department did not secure the approval of the Appropriations Committee, nor was this creation of the new office presented to the Tribal/BIA Reorganization Task Force or the Intertribal Monitoring Association for their review. Yet when this matter was brought to the attention of the Department, you continued this office and took no action against those who carried out these illegal actions.

Can you tell us why?

Mr. HOPPER. In terms of taking any action against the individuals who may have been involved in establishing the office in November 1992, that was done under the prior administration. I doubt that we could easily find any of those particular individuals.

In terms of carrying on the office subsequent to that time, the current administration is aware of the concerns that are being expressed by this committee, ITMA, and others regarding that office, but we have not made a decision at this point as to how we are going to rectify that situation. Our primary emphasis at this time is to attempt to carry on the activities that are needed to be done in terms of the reconciliation. We have very tight deadlines; we have a goal that we want to achieve, and we are attempting to do that, and at the same time resolve the issues that the Indian people have regarding the reconciliation effort, and at the same time we are attempting to decide exactly how we're going to manage the activities in Albuquerque.

The CHAIRMAN. Is the Office of Special Projects still in place?

Mr. HOPPER. The Office of Special Projects is still in place today.

The CHAIRMAN. And what about the Office of Trust Funds Management?

Mr. HOPPER. The Office of Trust Funds Management is still in place today.

The CHAIRMAN. And where are the staff people? Have they been transferred to the OSP?

Mr. HOPPER. There have been six members from the Office of Trust Funds Management that have been transferred to the special projects team to work on reconciliation. Several of those individuals

were doing reconciliation whenever they were in the Office of Trust Funds Management.

The CHAIRMAN. So OTFM is a hollow force?

Mr. HOPPER. No, sir; OTFM is not a hollow force. It has a director, it has a deputy, and it has a staff of 40-some-odd people at the present time.

The CHAIRMAN. Now, you spoke of not being able to locate the staffers. They are employees of the BIA, aren't they?

Mr. HOPPER. Not being able to locate whom, sir? I thought you meant who decided to establish the Office of Special Projects.

The CHAIRMAN. If you know that the office has been created illegally, why don't you do away with it, regardless of who ordered the creation?

Mr. HOPPER. I personally don't know that the office had been created illegally.

The CHAIRMAN. Well, have you seen the memo dated October 19, 1992?

Mr. HOPPER. No, sir; I have not.

The CHAIRMAN. From the management analyst, subject: "130DM Change, Secretary's Order for Special Project Staff"?

Mr. HOPPER. I would be happy to look that over.

The CHAIRMAN. It very clearly says that this was done in contravention of departmental regulations.

I would think that knowing that, I see no justification in continuing its existence, unless you want to support illegal action.

Mr. HOPPER. No, sir; I do not want to do that.

The CHAIRMAN. I asked Professor Whitman how much it would cost to bring OTFM into compliance with the standards set forth in this bill, and he says there would be very little cost.

What do you estimate the cost would be? Would it be very expensive?

Mr. HOPPER. To implement S. 925? I don't have a cost estimate on that. I'd be happy to get that cost analysis for you and provide it for the record.

[Information to be supplied not available at time of printing.]

The CHAIRMAN. Do you anticipate that the trust fund functions will be transferred to some other Federal agency?

Mr. HOPPER. At this point I don't know, sir. I know that GAO is doing a study; when that study is released, with the options, the administration will evaluate that and a determination will be made at that time as to in which direction they should proceed.

The CHAIRMAN. In the interim, will steps be taken to improve the trust fund management?

Mr. HOPPER. In the interim we will continue to improve trust funds management, that is correct.

The CHAIRMAN. Not business as usual?

Mr. HOPPER. No, sir.

The CHAIRMAN. We have been advised by numerous tribes that they have been completely cut out of any involvement in the trust fund cleanup since early this year, and I have here a memo from the Acting Deputy Commissioner telling OSP not to provide any information to ITMA or the Congress unless approved by the Deputy Commissioner. Why is this?

Mr. HOPPER. Is that the March 25 or 28 memo from Stan Speaks?

The CHAIRMAN. It is the recent one, yes.

Mr. HOPPER. The only memo that I know about is the memo signed by Mr. Speaks in March where he was simply advising the staff in Albuquerque that they should clear items through his office before releasing them to outside third parties. There was no intent in that memo to restrict anyone's access to documents or records that were available.

The CHAIRMAN. These documents will be made available to the beneficiaries, to the Indians?

Mr. HOPPER. I thought you were talking about the ITMA.

The CHAIRMAN. ITMA—well, they are the Indians.

Mr. HOPPER. If it's ITMA, then the instructions have been that we will make information available to them on an ongoing basis, and the same with the General Accounting Office.

The CHAIRMAN. But apparently, as the General Accounting Office is indicating, the ongoing sharing of information has somehow come to a halt.

Mr. HOPPER. I don't believe that that's in fact true. I've had a discussion with Gayle Condon of GAO, as I indicated earlier; I had a telephone conversation with her approximately 2 weeks ago where we discussed this item. I thought at that point that everything was cleared up. As a result of what went on this morning, I intend to have a follow-up discussion with both GAO and ITMA to find out exactly what they consider to be the problems and to get those resolved, because I do not want to restrict anyone from access to documents and records that they need to perform their jobs.

The CHAIRMAN. So you are assuring this committee that upon review, all information will be shared with the appropriate parties?

Mr. HOPPER. Appropriate information that they are entitled to will be shared with them, yes, sir.

The CHAIRMAN. You said appropriate information will be shared——

Mr. HOPPER. Don't misconstrue that as meaning that I'm going to restrict something from them. The items that they're asking for, they're going to get. If they want my personnel record, I would possibly have a little difficulty providing that to them; but if it has to do with what they are engaged in, it will definitely be made available to them.

The CHAIRMAN. Last year, the BIA awarded a self-determination contract to the Red Lake Tribe to perform an audit of BIA's handling of the Red Lake trust funds. We have received word from that tribe that the BIA has, since the award of the contract, gone to great lengths to pressure the tribe to withdraw the contract.

Do you oppose this audit contract?

Mr. HOPPER. I have no idea about anyone trying to put pressure on the tribe. I'm going to ask Jim Parris, the Director of OTFM, to respond to that. He's much more up on that one than I am at this point.

The CHAIRMAN. Mr. Parris.

Mr. PARRIS. Mr. Chairman, I am aware that there was a contract awarded to the Red Lake Tribe for this audit, and the last word

I had was that the audit was proceeding. We had arranged for records to be transferred to the Red Lake Agency. I am not aware of any attempt to halt the contract. We can do some research with the Minneapolis Area Office and the Red Lake Agency and get back to you on that.

The CHAIRMAN. I would appreciate that, because unless someone is speaking out of turn, without authority, that's the impression that we get from the tribe, that they have been pressured to withdraw.

Since you are there, Mr. Parris, were you in favor of the creation of the Office of Special Projects?

Mr. PARRIS. I asked for assistance from the Deputy Commissioner's office related to the reconciliation project since it was such a time-consuming effort and I was unable to devote the level of attention that I felt was needed to operations and to the reconciliation project both. They were just too much for me to handle by myself.

I asked the Deputy Commissioner for assistance, and his proposal was to initiate the special projects team to focus on this. I did support that assistance that he was able to provide. I needed the help.

The CHAIRMAN. Ms. Erwin, may I ask you a few questions?

Ms. ERWIN. Certainly.

The CHAIRMAN. Are you still on the staff, or is your resignation effective?

Ms. ERWIN. Yes; I am still on the staff. It will probably be effective on Friday.

The CHAIRMAN. On Friday?

Can you tell the committee the most critical problems that OTFM is facing in accounting in managing the trust funds now, and what can be done to resolve these problems? I ask you as a professional.

Ms. ERWIN. Our basic problems are staffing and systems. I think this has been brought out in various reports. You mentioned wholesale firing of the staff, or something. We have a very competent, dedicated staff. They are there long hours and they really care about the Indian people, but our problem is that we don't have the adequate staffing. We have a workload analysis that states that we need 82 people. We have the reorganization plan to support the workload analysis. Currently we have 51 authorized positions; of that, 45 are filled. We have 6 of those detailed to the special projects team, and as a result we are somewhere down in that 39 area for a workload analysis for which we think we need 92 [sic] people.

So it is virtually impossible to perform at the level that should be expected as a fiduciary with those types of restraints.

The other problems are systems. We definitely need to improve the systems, and that is part of the strategic plan.

The CHAIRMAN. In the fiscal year 1993 Appropriations Act we approved 90 positions.

Ms. ERWIN. Correct.

The CHAIRMAN. And of that, you have only 39?

Ms. ERWIN. That is correct.

The CHAIRMAN. Mr. Hopper, how can you explain that, sir?

Mr. HOPPER. It is my understanding that for 1993 we have approximately 51 positions, and for 1994 it is to go up to the 90-range, though it's not currently at the 90.

In order to clarify that, to make sure of the actual numbers, I will provide that for the record.

[Information to be supplied not available at time of printing.]

The CHAIRMAN. Am I to conclude from Ms. Erwin's statement that this office is not on your high priority list?

Mr. HOPPER. No, sir; that's not what you may—I would prefer that you not conclude from that statement.

The CHAIRMAN. If 90 positions are approved, as you have indicated, and 51 are in place—although, according to Ms. Erwin's calculation, there are 39 in place——

Mr. HOPPER. Well, there are also some hirings going on. I have released the selection on the Chief of the Investments Division. We have some accounting technicians that we are in the process of hiring. We have a computer specialist that we're hiring. All of those have been approved to proceed on.

There are some people on the staff who are working on the reconciliation effort over in the Special Projects Office who would be working on the reconciliation effort even if they were under Mr. Parris' direct supervision.

The CHAIRMAN. Ms. Erwin, the committee has been advised that you have not only been performing the OTFM Deputy Director job, but you have also been handling the work of the vacant Investment and Accounting Chief position.

Now, when you leave this Friday, who will be managing these functions? Are there people in place?

Ms. ERWIN. I think that question would be better answered by Mr. Hopper.

The CHAIRMAN. Do you have someone in place or in training to take over?

Ms. ERWIN. Not currently, but I believe that would become a management question for Mr. Hopper.

Mr. HOPPER. I have currently approved the hiring of a division Chief for the Division of Investments. It will take some time for that individual to come on board. In the meantime, we still have staff in place, and we have Mr. Parris who is there.

I think it is also important to know that Ms. Erwin and I are having ongoing dialog regarding her impending departure, and we are hopeful that within the next couple of days we are going to be able to reach an agreement and that she will be able to stay on with us.

The CHAIRMAN. The committee has been made aware that a computer contractor's modification to OTFM's accounting system went bad just before the contract ended, with the result that four BIA area offices have not had any accounting services for over 2 weeks. I believe that on May 28, Phoenix closed up, and on June 1, Aberdeen went down; and then Billings and Portland.

What actions did OTFM management take to solve this problem? Did OTFM receive any support from BIA on this? Ms. Erwin?

Mr. HOPPER. Regarding the support issue, I can assure you that I am aware of the situation that developed out in Mr. Parris' office regarding this particular issue. We brought Mr. Parris in last week

and met with staff, to include the contracting side of the house, to work out any problems that we may have with that issue. For any further detail with regard to how we're progressing with ensuring that the systems are operating at the area level, I will turn that over to Mr. Parris to answer.

Mr. PARRIS. The impact of the system breakdown caused some accounting entries not to be recorded in our general ledger accounting system in Albuquerque, but the information was being recorded in the subsidiary accounting systems at what we call the IIM system, for the individual Indians. That data allows us to invest the money and to account to the account holders individually.

We were trying to gain access to the contractor to accomplish the programming to correct the deficiencies in the system that was being utilized to do an automated interface between the two systems that we were trying to maintain, and the Office of Data Systems in the Bureau of Indian Affairs was unable to provide that programming. They were involved in discussions last week with us and with contracting in trying to work out the details of how we could gain access to the contractor so that they could learn enough about the programs to be able to do the fixes themselves.

Currently, it's my understanding that the paperwork is supposed to be ready within the next day or two that would allow us to gain access to the contractor and go on and accomplish the fixes.

The CHAIRMAN. Mr. Hopper, the committee has been told that the Department has put a freeze on any contracts for systems to improve trust fund investment. I would like to know why, because we have been told time and again that one of the major weaknesses in this whole area is in the area of investment.

Why is this freeze?

Mr. HOPPER. The final determination as to where we should go with any systems development is going to be tied very closely to the decision made as to what happens to trust funds management, investments, and accounting. So there has been a delay pending the GAO report, and then a final decision regarding how we're going to proceed.

The CHAIRMAN. And at the present time you are investing about $100 million, are you not?

Mr. HOPPER. Yes, sir.

The CHAIRMAN. Do you want to improve that?

Mr. HOPPER. Yes, sir.

The CHAIRMAN. But we are not going to do that?

Mr. HOPPER. At the present time, we just feel it would be best that we delay any final decision regarding the systems development.

The CHAIRMAN. How long will this delay be?

Mr. HOPPER. It will depend on how quickly the General Accounting Office gets out the report, and the new administration, along with the new Assistant Secretary, can make a final determination on which way we will proceed.

The CHAIRMAN. GAO says that in order to come forth with a completed report by December of this year, it would require full cooperation. Are you going to provide that?

Mr. HOPPER. Yes, sir; I am. I assure you, Mr. Chairman, that I will provide full cooperation to the General Accounting Office.

The CHAIRMAN. Well, as you must have noted, this committee is very much concerned about what is happening here. As statements have been made, this sad situation has been in existence for many, many decades. Sadly, you have inherited this, and I hope that we can work together to resolve this matter and not have it continue for another 165 years.

I am certain you will agree that as trustees, we owe that much to the Indians. The record so far has been dismal, at best, and at times unbelievably negligent.

So I hope we can do something about this.

So we will be calling on you and we will be requesting that you keep us apprised of what is going on.

Mr. HOPPER. Yes, sir.

The CHAIRMAN. I hope that your review of documents will be carried out expeditiously. I hope you will give OTMF a little higher priority. You had 90 positions, but you decided to fill 51. That doesn't speak too highly of your priority list, but I hope we can find improvements.

We thank you very much, Ms. Erwin, Mr. Parris, Mr. Hopper.

Ms. Erwin, we wish you the best in your retirement—you're not retiring, are you?

Ms. ERWIN. No thank you.

The CHAIRMAN. So we may be seeing you again. Thank you very much.

With that, the committee is adjourned, subject to the call of the Chair.

[Whereupon, at 12:32 p.m., the committee adjourned, to reconvene at the call of the Chair.]

APPENDIX

Additional Material Submitted for the Record

Prepared Statement of Hon. Byron L. Dorgan, U.S. Senator from North Dakota

Mr. Chairman, the Bureau of Indian Affairs [BIA] is charged with managing over $2 billion in tribal and individual Indian trust funds. These funds are derived from Indian trust resources, and from compensation for treaties and agreements with the federal government. It is unconscionable to have these funds subject to mismanagement by the federal government.

The Savings and Loan scandals of the past decade rightfully incensed the Nation because the thrift industry neglected their fiduciary responsibility to their customers. And yet, in the situation before us, we have the federal government itself involved in mismanagement of funds belonging to some of our neediest citizens. Last year, in a report entitled Misplaced Trust, the House Government Operations Subcommittee on Environment, Energy and Natural Resources stated the BIA's "supervision and control of Indian trust funds is not adequate to fulfill the government's fiduciary duties to Native American beneficiaries of the trust." They concluded that the management of the trust funds was a "national disgrace."

The Turtle Mountain Band of Chippewa Indians from North Dakota is one of several plaintiffs in a lawsuit on this exact issue. That litigation involves the BIA mismanagement of the Pembina Judgment Fund, which it has held in trust since 1982. The Tribe is currently awaiting the results of an audit performed by an outside accounting firm to determine if the BIA is guilty of nonfeasance, malfeasance, or both. Pending the outcome of this audit the Tribe has a motion for further discovery into BIA records. When the Turtle Mountain Band of Chippewa has to resort to lawsuits against a government agency—whose sole purpose is advancing and assisting Native Americans—to protect its own assets, it is indeed a "national disgrace."

Last year, I was Chairman of a Congressional Task Force on Government Waste. Our report referenced independent audits of the BIA which found that the agency was unable to account for 10% (around $95 million) of the funds it manages. We also quoted an Office of Management and Budget official who—when referring to the BIA mismanagement—stated "there's no suitable accounting oversight, no national financial management system . . . The current system is like an ATM (cash machine) for BIA employees." I wholeheartedly agree that reform legislation in this area is needed

Mr. Chairman, it is for these reasons, that I thank you for introducing this bill and holding these hearings. By requiring the BIA to obtain an appropriate rate of interest when investing individual Indian money accounts, provide the tribes with greater options for investments, and establish minimum standards for operation, the bill will place responsibility on the BIA to effectively manage these assets

This issue is obviously of extreme importance to Native Americans. I look forward to working with the Committee and the full Senate on this important legislation.

Prepared Statement of Hon. Mike Synar, U.S. Representative from Oklahoma

Mr. Chairman, thank you for this opportunity to appear and testify in favor of S. 925, the Native American Trust Fund Accounting and Management Reform Act of 1993. This measure is identical to H.R. 1846, which I introduced in the House of Representatives on April 22, 1993.

Enactment of this measure will promote reforms of the Indian Trust Fund which are long overdue, and I am here to lend the bill my strongest support.

The Native American Trust Fund Accounting and Management Reform Act was the product of more than four years of investigation and oversight by my Subcommittee. The purpose of the Subcommittee investigation was to review and evaluate the Bureau of Indian Affairs' efforts to identify and correct chronic management deficiencies that have plagued the Indian Trust Fund program for decades.

Mr. Chairman, the Bureau has repeatedly failed to fulfill its fiduciary duties to the beneficiaries of the Indian Trust Fund. The Bureau's management of the Indian Trust Fund has been—and unfortunately continues to be—grossly inadequate in numerous important respects. The Bureau cannot accurately account for Trust Fund monies. It cannot even provide account holders with meaningful periodic statements on their account balances. It does not consistently and prudently invest trust funds and pay interest to account holders. It does not have consistent written policies or procedures that cover all of its trust fund accounting practices. Under the management of the Bureau of Indian Affairs, the Indian Trust Fund is equivalent to a bank that doesn't know how much money it has.

Fortunately, inattentive and indifferent leadership within the Department of the Interior, which has worsened the scope and severity of the gross mismanagement by the BIA headquarters staff, may be a thing of the past. Under the leadership of Secretary Babbitt and Assistant Secretary Bonnie Cohen, I think we now have underway a sincere and committed effort to reform the Bureau and the Department. But it will take the collective efforts of the Administration, Congress and the Native American community to sustain and support that reform effort.

Mr. Chairman, as you know, this legislation requires the Secretary of the Interior to invest and pay interest on Individual Indian Money (IIM) funds held in trust by the federal government; it authorizes demonstrations of new and innovative approaches for the management of Indian Trust Funds; it clarifies the trust responsibility of the United States with respect to Indians; it establishes a program for the training and recruitment of Indians in the management of trust funds; and, it requires an accurate periodic accounting of Indian Trust Funds to the account holders. Its enactment is essential to reform longstanding mismanagement of the Indian Trust Fund and to give the 300,000 Native Americans for whom the Bureau of Indian Affairs holds money in trust a greater say in the management of their affairs.

Mr. Chairman, you understand better than most that the system of trusteeship and federal management of Indian funds is deeply rooted in Indian-United States history. Treaties are the first and probably most important means by which trust funds were held by the United States for the benefit of individuals or tribes. While the earliest treaties did not provide that the United States retain funds in trust for the tribes, in 1820 the federal government adopted the policy of holding tribal funds in trust.

Later, the role of trustee was delegated to the Secretary of the Interior. Since 1918, the Interior Department's Bureau of Indian Affairs [BIA] has had the legal authority to invest Indian Trust Funds. In 1938, the Bureau decided that all Individual Indian Money (IIM) funds would be invested and managed by its Agency Offices. Since 1966, the BIA's Branch of Investment has pooled all IIM accounts for investment purposes. The Bureau locates interest earned on the investment pool to individual accounts.

In April 1992, the House Committee on Government Operations unanimously approved a report based on a three year investigation by my Subcommittee of the BIA's mismanagement of the $2 billion Indian Trust Fund. That report, House Report 102-499, demonstrated that the BIA's disgracefully indifferent supervision and control of the Indian trust funds has consistently failed to exercise its responsibility and has failed all reasonable expectations of the tribal and individual account holders, Congress and taxpayers.

The Indian Trust Fund is more than balance sheets and accounting procedures. These monies are crucial to the daily operations of Native American tribes and a source of income to tens of thousands of Native Americans. Although it should go without saying, it seems forgotten that these funds do not belong to the Bureau—they belong to tribes and individual Native Americans. We are simply the trustee, and a pretty poor one at that. Sadly, the Bureau of Indian Affairs has failed to fulfill its fiduciary duties to the beneficiaries of the Indian Trust Fund. The Committee on Government Affairs' report outlined these problems and made numerous recommendations to improve the management of the Indian Trust Fund and thereby improve the protection of the account holder

Financial management problems in the Bureau of Indian Affairs' management Trust Fund have been neglected for decades. There is a continuing crisis in the management of the Trust Fund that can only be cured by radical changes in lead organization, accountability and communication by the Bureau of Indian Affairs and the Department of the Interior.

The real losers in the mismanagement of the Indian Trust Fund are the Tribes and the individual Indian account holders. These account holders are being victimized by the federal government. Yet they have had no recourse except to the very agency that is responsible for their predicament.

The legislation before the Committee today was designed to correct these deficiencies. It was prepared with the advice and counsel of many Native Americans and tribal officials. It does

not contain all the answers for correcting the manifest difficulties presented by the current mismanagement of the Indian Trust Fund. For example, it does not establish a procedure for directing settlements for account holders caused by past mismanagement by the Bureau of Indian Affairs; this is because the dimensions of such losses and any potential settlements will not be known until many of the existing accounting problems are corrected. However, the Act does provide a good starting point for discussion and dialogue on that subject.

Here is summary of what the Native American Trust Fund Accounting and Management Reform Act of 1993 will do:

> Title I amends 25 U.S.C. 162a with the same language as contained in the Native American Trust Fund Equity Act of 1991, H.R. 1756, which I introduced on April 10, 1991. The measure would require the Secretary of the Interior to invest in a productive manner and to pay interest to account holders. It will hold the Secretary accountable for any failure to prudently invest funds held in trust for individual Native Americans. Moreover, it will authorize the Secretary of the Interior to pay lost interest resulting from past BIA failures to properly manage IIM investments.
>
> This legislation reinforces our moral and ethical obligations to Individual Indian Monies account holders. By its enactment, Congress will create the authority for the Secretary of the Interior to honor the federal government's fiduciary responsibilities to Native Americans; however, any expenditures under such authority will be subject to the annual appropriations process.
>
> Title II authorizes demonstration programs that will give Indian tribal governments greater control over the management of their tribal and individual Indian funds held in trust by the United States; involve tribal governments in instructing the Secretary to invest tribal and individual Indian trust funds in a manner that will promote economic development in Indian trust communities; and demonstrate how the principles of Native American self-determination—principles we strongly support—can work with respect to trust fund management.
>
> Title III tracks the Government Operations Committee's recommendations to clarify the trust responsibilities of the United States.
>
> Title IV authorizes the Secretary to establish a program to assist Indians obtaining expertise in the management of their trust funds.
>
> Title V requires the Secretary of the Interior to accurately account for the daily and annual balances of Indian Trust Funds, to provide Indian Trust Fund account holders with periodic statements of account balances and to obtain an annual audit of such funds.

The scope and severity of the gross mismanagement by the BIA headquarters staff historically has been made worst by inattentive and indifferent leadership within the Bureau of Indian Affairs and the Department of the Interior. This type of trust fund mismanagement would never be tolerated in other, similar federal trust activities. Indeed, if bankers and private trustees handled people's money the way the Bureau has handled Native Americans' trust funds, we would put them in jail. That this has taken place in the administration of the federal government's sacred trust for Native Americans can only be described as a national disgrace.

The trust of the Congress, the taxpayers—and most importantly—the tribes and Individual Indian Money account holders has been misplaced in the Bureau of Indian Affairs. BIA has failed us all in the performance of its duties.

Mr. Chairman, clearly, the responsibilities imposed by Treaties, statutes and the courts have established a complex set of responsibilities for the BIA. However, accounting for the daily and annual balances of the Trust Fund has been a continuing point of controversy and rightful criticism of BIA management. There are hundreds of thousands of Native Americans who look to the BIA for the help, understanding and cooperation. They deserve leadership. They deserve support. They deserve accountability. They deserve a fair shake, honest and competent administration from there government. They deserve to have greater control over their own destiny. They deserve the enactment of Native American Trust Fund Accounting and Management Reform Act of 1993.

I first introduced this legislation as H.R. 6177 on October 10, 1992 to provide my colleagues an opportunity to study the measure and to provide the Native American community, including tribal leaders and representatives of Indian Trust Fund account holders, an opportunity to consult with Congress and the Administration on the implications of these important changes in the relationship between Native Americans and the federal government. After nearly six months and a broad set of discussions, the reaction to these proposals has been overwhelmingly positive. I deleted the original Title III from last year's bill, which authorized demonstration programs to promote the development of energy resources on Indian lands. That Title was modeled after the provisions relating to Indian natural resource development contained in H.R. 776, the National Energy Strategy, which was enacted as P.L. 102–486 and became law on the October 24, 1992.

The only new matter included in this measure is Title V, which specifically requires the Secretary of the Interior to account for daily and annual balances of Indian Trust Funds, to provide

Indian Trust Fund account holders with periodic statements of account balances and to obtain an annual audit of such funds. This new requirement operates on the simple principle that information is power. The sooner the Secretary is required by statute to account for and report account balances, the sooner the Department and BIA will take the steps necessary to correct longstanding financial management problems and promote a settlement for account losses caused by the Bureau's past mismanagement.

Mr. Chairman, the time has come to enact the Native American Trust Fund Accounting and Management Reform Act of 1993. I look forward to working with you and the Committee on Indian Affairs, as well as my colleagues in the House, to ensure its rapid enactment.

PREPARED STATEMENT OF BRIAN P. CROWLEY, DIRECTOR, PLANNING AND REPORTING, ACCOUNTING AND FINANCIAL MANAGEMENT DIVISION, GENERAL ACCOUNTING OFFICE

We are pleased to be here today to discuss the management of the Indian trust funds by the Bureau of Indian Affairs (BIA).

Mr. Chairman, on two occasions last year, in July and August, we testified before this Committee on BIA's management of the Indian trust funds. Our testimonies addressed the nature of BIA's past problems, the status of its trust fund reconciliations, and actions BIA might take to improve trust fund operations. My statement today will discuss BIA actions to correct past problems since our testimonies last year, problems that still need to be addressed, and our comments on S. 925, the Native American Trust Fund Accounting and Management Reform Act of 1993.

By way of background, I will first summarize the problems and the needed actions that have been recommended to overcome the problems.

As you know, the Secretary of the Interior is directed by law to manage Tribal and Individual Indian Monies (IIM) trust funds. BIA, through its Office of Trust Funds Management (OTFM), is responsible for carrying out the government's fiduciary responsibility of ensuring that proper control and accountability are maintained over each trust account. The OTFM, located in Albuquerque, New Mexico, oversees trust fund operations at BIA's 12 area offices and 93 agency offices.

In fiscal year 1992, OTFM was responsible for managing and accounting for about $2 billion, representing approximately 1,880 tribal and 288,000 IIM trust fund accounts. At fiscal year-end 1992, reported receipts totaled almost $550 million and disbursements totaled about $500 million. Tribal and IIM accounts had reported balances of $1.5 billion and $440 million, respectively. The balances in the trust fund accounts have accumulated in part from payments of claims, oil and gas royalties, land use agreements, and investment income.

In summary, BIA has had difficulty in fulfilling its fiduciary responsibility to ensure that proper control and accountability are maintained over each trust fund account. BIA's record has been so poor that the Office of Management and Budget (OMB) has placed trust fund accounting on its high-risk list. Over the years, countless audit reports and internal studies have detailed a litany of problems in BIA's control and oversight of these accounts.

The audit reports have included recommendations to BIA to

—develop written policies and procedures for the conduct of trust operations,
—periodically reconcile account balances,
—arrange for periodic audits of trust fund operations,
—provide periodic statements to account holders, and
—arrange for training of personnel involved in trust operations.

In our August 1992 testimony, we said that OTFM cannot correct BIA's trust fund management problems in isolation from other Bureau and Department components. For example, the Bureau of Land Management and the Minerals Management Service (MMS) are responsible for the trust-related functions of land and lease management, and oil and gas royalty collections and accounting, respectively. The cooperation of these organizations is essential to correcting BIA's trust fund management problems.

We stated further that, to effectively address long-term trust fund management problems, BIA needed to develop a comprehensive strategic plan for addressing every aspect of its trust fund operation, including interfaces between other systems and operations that impact trust fund accounting. We also advised BIA officials about how the Chief Financial Officers Act of 1990, Public Law 101-576, can provide a framework to use for improving trust fund management.

Status of Trust Fund Improvements

Since our testimony last August, BIA has made some progress in making short and long-term trust fund management improvements. Some examples follow.

—In January 1993, BIA issued an advance copy of its strategic plan for trust fund financial management improvement. Due to the scope and complexity of its trust fund management problems, BIA divided the strategic plan into two phases. Phase I covers

improvements needed within OTFM, whereas Phase II of the plan, which is still being developed, is to cover improvements in organizations outside OTFM.

—Interest on MMS oil and gas collections, which had not been distributed to account holders since 1985, was distributed to all but the Navajo tribe during the past year. The Navajo funds are available and are to be distributed pending the outcome of a review by the tribe's accounting firm of BIA's computer program for distributing income.

—OTFM has brought its fiscal year 1993 systems reconciliations backlog up-to-date, with a few exceptions. According to OTFM, the trust fund general ledger accounts are being reconciled to their Treasury accounts and Investments subsystem accounts. In addition, the IIM subsystem accounts are being reconciled to the general ledger at most area offices. Those areas having difficulty are receiving assistance from OTFM.

—In response to our recommendation that BIA conduct an organization and staffing analysis, OTFM contracted for a workload analysis of OTFM, which was completed in November 1992 and presented to BIA.

In November 1992, BIA management created an Office of Special Projects to oversee the trust fund reconciliation project and develop phase II of the strategic plan. OTFM retained responsibility for routine trust fund operations and the short-term trust fund improvement projects. The following has occurred with regard to the trust fund reconciliation project.

—In March 1993, the Department directed the Office of Special Projects to focus its attention almost exclusively on the tribal reconciliation project and mandated that the work be completed by March 1994. The Director of the Office of Special Projects has developed an ambitious plan to accomplish the tribal reconciliation work by that date.

—A team consisting of BIA, Department, and Inter-tribal Monitoring Association representatives was formed to explore settlement or other alternatives to reconciling the IIM accounts, whose reconciliations were halted in February 1992 primarily due to missing records and the potential costs of reconciling a large number of small accounts. To date, the team has had two meetings.

Problems That Still Need to be Addressed

In spite of this progress, we have identified a number of concerns affecting trust fund management improvement and reconciliation project. As we testified last year, BIA recognized the seriousness of its problems, but was making only limited progress in addressing them. Currently, there are a number of areas where progress is lagging. Some examples follow.

—Implementation of Phase I of BIA's strategic plan is on hold until the new administration has time for review and comment. Development of Phase II of the plan is moving ahead slowly due in part to a Department directive to focus priority attention on the tribal reconciliation project.

—OTFM prepared a reorganization plan which would increase its staff from 51 to 90 positions. However, OTFM's reorganization has not been implemented because the Department is considering out-sourcing some OTFM functions included in OTFM's reorganization plan.

—BIA management created the Office of Special Projects to oversee the reconciliation project and reassigned six OTFM staff and $8.4 million to the Office. We believe the timetable of March 1994, which the Department has established for completion of the reconciliation, may be unrealistic given the volume of records to be reviewed and time required to search for missing documents.

—In addition to losing staff to the Office of Special Projects, BIA has not filled certain key OTFM vacancies, such as the Investment and Accounting Chief positions. As a result, OTFM has not been able to implement pilot tribal investment programs. Tribes are expressing concern about implementation delays for the investment pilots.

—OTFM has developed an inventory of needed written trust fund policies and procedures but the policies and procedures have not yet been developed.

Since January 1993, the administration has moved slowly in making key BIA appointments. Neither the Assistant Secretary for Indian Affairs nor the position of Deputy Commissioner for Indian Affairs have been filled. In the interim, the previous administration's Assistant Secretary for Indian Affairs remained in that position and also several members of the previous management team have served as Acting Deputy Commissioner for Indian Affairs. In addition, OTFM's Deputy Director has resigned effective June 23, 1993, leaving another key vacancy to be filled.

S. 925 Reforms

The Native American Trust Fund Accounting and Management Reform Act of 1993 (S. 925), the subject of today's hearing, mandates many of the improvements recommended in BIA audits and contractor studies. Among other things, the proposed legislation

—reaffirms the trust responsibility of the United States and instructs the Secretary to provide (1) adequate systems for accounting, (2) adequate internal controls and periodic timely reconciliations, (3) account holders with meaningful, periodic statements of their accounts, and (4) periodic statements of performance and an annual audit of the trust fund accounts;

—reaffirms that the government's trust responsibility includes the funds derived from the use and sale of leased lands, judgments, mineral leases, oil and gas leases, timber permits and sales, and water resources; and

—requires that the Secretary establish a program to assist Indian people to obtain expertise in the management of trust funds, including outreach agreements with financial institutions to provide classroom training, internships, and employment opportunities.

The Department of the Interior has been responsible for performing most of the functions specified in S. 925 all along. The proof of whether the Department will carry out the provisions of S. 925 will be in the new administration's execution of these initiatives.

Adequate staffing, the filling of key positions, and the support of senior Department and Bureau managers are important elements to fixing BIA's trust fund problems. These problems took many years to develop and even with concerted effort, sufficient staffing and funding, and the strong support of Department and Bureau management, the Congress, and OMB, these problems will take time to correct.

Mr. Chairman, I wish to thank the Committee for the opportunity to testify on our work and on this important legislation. This concludes my remarks. I would be happy to answer any questions you or Members of the Committee may have at this time.

Brian P. Crowley

Mr. Crowley is the Director of Planning and Reporting in the Accounting and Financial Management Division (AFMD) of the General Accounting Office (GAO). Before joining AFMD, he was the Senior Associate Director responsible for directing GAO's work on food and agriculture programs.

Since joining GAO in 1962, Mr. Crowley has worked as an Associate Director in the former Federal Personnel and Compensation Division responsible for GAO's work on federal pay and retirement systems, as well as morale, welfare, and recreation programs for federal employees. He was also an Assistant Director in the former Community and Economic Development Division, in charge of the Environmental Protection Agency audit site and later the Agriculture audit site.

Mr. Crowley graduated cum laude from Fairfield University, Fairfield, Connecticut, in 1962 and received a B.B.A. in Accounting. He participated in the Civil Service Intergovemmental Affairs Fellowship Program in 1971 and attended senior executive education programs at the Federal Executive Institute in 1978 and the Dartmouth Institute in 1988. Mr. Crowley is a CPA (Virginia) and a member of the American Institute of Certified Public Accountants. He received the Wall Street Journal Award for scholastic achievement, the Virginia Society of Certified Public Accountants Gold Medal Award and numerous GAO awards, including the GAO Career Development and GAO Distinguished Service Awards and the SES Meritorious Executive Award.

Prepared Statement of Woodrow Hopper Acting Deputy Commissioner of Indian Affairs

Mr. Chairman and Member of the Committee, I am here today to discuss Senate Bill 925, The Native American Trust Fund Accounting and Management Reform Act of 1993. This bill is the companion to the House H.R. 1846 introduced by Congressman Synar on April 22, 1993.

As the Committee is aware the reconciliation of the Indian trust fund accounts and the development of a policy for future trust funds management are among the most visible issues facing the Department of the Interior and the Bureau of Indian Affairs.

The Department and the Bureau of Indian Affairs have made improvement of Indian trust funds management a high priority.

We are continuing with Arthur Andersen & Company in the reconciliation of tribal trust accounts and development of automated trust systems reconciliation pursuant to the method jointly developed by the Department, the Office of Management and Budget (OMB) and tribal representatives.

In addition, the Committee should be aware that the Department's Individual Indian Monies (IIM) study Team is meeting to develop an acceptable, cost effective approach by September 30, 1993 for reconciliation of the IIM accounts.

In testimony before the Committee on January 25, the Secretary questioned whether the BIA should be devoting substantial resources to developing a capacity for funds management that already exists today, both in other federal agencies as well as in the private sector. Since that time, information from tribal representatives, Congressional staff, OMB and other interested par-

ties had led the Department to conclude that we should thoroughly explore whether the Indian trust funds management functions should be transferred out of the Department.

Representative Michael Synar's recent request of March 11 to the U.S. General Accounting Office (GAO), to conduct an in-depth review of transferring Indian trust funds management from the Department of the Interior provides an excellent basis and vehicle for this dialogue. As you know, that review is designed to study the various alternatives to the BIA that exist both within and outside the government, and report back to Representative Synar on the findings. We expect that the GAO analysis will provide parties—and particularly the tribal representatives—with an expert, objective analysis that will serve as basis for a decision most beneficial to the interests of the account holders.

Let me now turn to the proposed legislation S. 925. We recommend that enactment of any legislation await the completion of the GAO study and the conclusions of the Congress, the tribes, and the Department resulting from that study. Obviously the substance of legislation could vary significantly, depending on the recommendation as to the agency to be performing the management, and the views of that agency.

We will work with you at that time to develop the appropriate legislation which could, of course, encompass significant elements of S. 925. At this time, we would prefer not to provide specific comments on S. 925.

I will, however, speak briefly to the concept of demonstration projects. The Department supports demonstration projects that enhance Indian self-determination and promote Indian economic development. The concept of demonstration projects have been an integral part of the Bureau's improvement plans for Indian trust funds management. In fact, the Bureau has an initiative for local/regional investment demonstration projects well underway and would be pleased to work with tribes in selecting other suitable demonstration projects.

We recommend that any legislation provide the Secretary with broad discretion as to which programs and the number of demonstration programs to be authorized at a given time. Also, in any legislation the term "Tribe" should be defined as Federally recognized tribe.

Thank you Mr. Chairman, this concludes my prepared statement. We would be happy to respond to questions you may have.

PREPARED STATEMENT OF JAMES W. BARNES, SENIOR VICE PRESIDENT & SENIOR TRUST OFFICER, BANK OF OKLAHOMA, N.A.

Mr. Chairman and members of the Committee, thank you for the opportunity to submit this statement to the record of the June 22, 1993, hearing on S. 925. The Bank of Oklahoma supports enactment of S. 925 and its companion bill in the House of Representatives, H.R. 1846.

S. 925 offers an opportunity for more efficient management of Indian trust funds by providing Indian tribes with increased authority and flexibility over them. In doing so, the legislation enables institutions such as the Bank of Oklahoma to assist Indians in making more efficient and productive use of their trust funds without compromising their security. Title II of the bill establishes a Trust Fund Management Demonstration Program that for the first time would enable the Bank of Oklahoma to work with Indian tribes and groups of individual Indians to develop financial services for collection, disbursement of Indian trust funds. The bill would also enable us to develop a program, in cooperation with Indian tribes, for the training government and tribal employees in trust fund management.

The Bank of Oklahoma is especially well-suited to assist with the implementation of S. 925, should it be enacted, because of its location in a state with one of the greatest populations of Indians in the United States.

Bank of Oklahoma, N.A., a 2.6 billion dollar institution, is the largest locally owned financial institution in Oklahoma and is expressly interested in supporting Oklahoma economic development including Native Americans. Bank of Oklahoma entered the custody and investment management business in 1910 and currently serves as custodian for over 6.8 billion dollars of assets and as investment manager for over 2.5 billion dollars. We presently serve a number of Native American Tribes; Trustee and Investment Manager for the 4.5 million dollar Cherokee Nation of Oklahoma Money Purchase Pension Plan, serving 880 participants and the Cherokee Nation Industries Profit Sharing Plan, serving over 200 participants. Bank of Oklahoma also participates in financing single family residences through Buckskin Construction and Tribal Housing Authorities. As a firm located in the original Indian territory we employ 72 native Americans in our offices state wide.

The "Trust Management Demonstration Program," proposed in S. 925 will provide an opportunity for Native Americans to develop a committee infrastructure necessary for monitoring the performance of investment professionals. These "Trust Management Committees" can bring value to the tribes through competitive bidding for services and automation of investment processes. We have found such committees to be very responsive to their constituents needs, but retaining the independence to make difficult decisions. Bank of Oklahoma can support this Trust Management process through counseling, technology and reporting tools. This bill incorporates

requirements that are currently common trust business practice in both the private and public sectors and will be easily implemented using current business models.

If you have any question about this or other matters about tribal trust fund management on which you would like our comment, please do not hesitate to contact me.

INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS
TESTIMONY ON S. 925--THE NATIVE AMERICAN TRUST FUND ACCOUNTING AND MANAGEMENT REFORM ACT OF 1993

BEFORE

THE SENATE COMMITTEE ON INDIAN AFFAIRS

June 22, 1993

The Intertribal Monitoring Association on Indian Trust Funds ("ITMA") is pleased to have this opportunity to testify today on S. 925, a bill that will increase tribal control over their own trust funds, as well as provide a statutory framework for improving the BIA's management of those funds. My name is Elouise Cobell. I am the chair of ITMA, which was established by tribal governments to provide a coordinated way for tribes to help improve the management of their trust funds. I am also the comptroller for the Blackfeet Nation and an IIM account holder.

Before I discuss the proposed legislation, I would like to use this opportunity to express my deep thanks to you, Mr. Chairman and to Congressman Synar for the very strong support you have provided to the tribes in the on-going effort to straighten out the BIA trust fund program. Over the past two years, we have been in what seems never-ending battles with bureaucrats who do not want tribes to have any involvement in how their trust funds are managed, who do not want anyone to examine what has gone on in the past, or to make whole the tribes and Indians who have been harmed by the BIA's past mismanagement. We would not have survived those battles or been able to see the progress we have were it not for the personal commitment of you, Congressman Synar, and Congressman Yates on this issue.

Almost two years ago, ITMA held its first meeting to develop a tribally-developed agenda for the trust fund program. It was a historic meeting because it was the first time in 150 years that the Indian account holders actually organized to have input into the way their trust funds are managed. At that meeting, a facilitator asked the participants to put down on a piece of paper their highest priority for the future of trust funds. When she put those piece of paper up on the board, the vast majority of participants asked for increased tribal control over their trust funds. The second priority to come out of that exercise was a request for more responsive service from the BIA, particularly better information to the account holders. We are pleased to see that both of these priority goals of the tribal representatives are addressed in S. 925. For that reason, ITMA strongly supports the legislation and ask Congress to enact it as soon as possible.

I would now like to address each of the major titles in the bill.

1. PAYMENT OF INTEREST TO IIM ACCOUNT HOLDERS.

Title I would correct a great injustice that exists in the legislation now applicable to the BIA management of Indian trust funds. According to GAO, while the BIA has an affirmative obligation to obtain appropriate earnings or interest from its investment of tribal funds, it has no legal obligation to obtain an appropriate return from its investment of individual Indian IIM monies. As a result, according to GAO, an IIM account holder who did not receive a fair rate of interest could not successfully bring a lawsuit against the United States for damages. This unjust situation results from the wording of the statute, which when addressing the investment of individual Indian trust funds, uses the word "may" when it should have used the word "shall." Title I would correct this injustice and make it retroactive so that individual Indians who were denied a fair return in the past can bring a successful claim for it.

2. INCREASED TRIBAL CONTROL OVER THEIR TRUST FUNDS.

On the issue of greater tribal control over trust funds, I want to begin by emphasizing that the legislation does not require any tribe to take any action. Consistent with the principles of self-determination, those tribes that want to continue their present trust fund management arrangement with the BIA are free to do so. The provisions providing increased tribal control of their trust funds are applicable only to those tribes that choose to use them.

For those tribes that wish to exercise greater control, the legislation provides broad parameters on the optional approaches they can use, rather than trying to list all of the possible options. ITMA strongly supports this approach. At this stage, it is impossible to know all of the different approaches tribes will develop. Therefore, it is preferable to keep the language as broad as possible in order to promote innovation and creativity. We think that this legislation will spark a range of creative approaches that will provide tribes with greater yields and enable them to use their trust funds to promote reservation economic development. However, rather than speculating on ways they will do this, we think the proof will be in the actual new approaches that emerge in the coming years. Therefore, the tribes should be provided the flexibility to shape an approach that best meets that tribe's unique circumstances and objectives. Title II provides this flexibility.

We do have one recommended addition to this portion of the bill. Several tribes have said that they will want to begin by putting only a portion of their money into one of the self-determination demonstration options. Depending on their experience during the five year period of the demonstration, they may want to move some but not all of their funds from the demonstration portion back to the BIA managed operation or in the other

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direction. Presently, the bill does not provide for such movement back and forth between the regular BIA management and the demonstration. We request that language be added to permit such movement. Attached to our testimony is proposed language to that effect.

By providing the tribes with this broad latitude to be creative, Congress is imposing new responsibilities on the BIA, which is charged with reviewing the plan and determining that it meets the test of reasonable prudence. The BIA also is obligated to conduct annual audits to insure the plan is being followed. Presently, the BIA lacks the kind of staff needed to effectively perform these roles. Nor does it have the FTE positions or appropriations to obtain this capability, directly or through contract. We urge this Committee to encourage the Senate Appropriations Committee to include funds in the FY 94 budget to enable the BIA to carry out these roles. At this point, it is our belief that the BIA would be best off if it were to contract with a private entity to perform these tasks, rather than to staff up. But regardless of which approach is taken we are concerned that if the BIA is not given the resources to properly carry out its responsibilities under the Act, one of two things will happen -- neither of them desirable. Either the BIA will fail to take action when tribes submit plans, or the BIA will not be able to bring considered judgment to bear and will end up approving plans that should not have been approved, thereby promoting failure in the demonstration program. We hope both of these negative options will be avoided.

Even if the resources are given to the BIA, tribes will be able to benefit from these self-determination provisions only if they are fully and fairly implemented by the BIA. ITMA has already heard rumblings from the old-line bureaucrats that Congress can enact legislation to give tribes control of their trust funds but the Department does not have to implement it. This reflects a much larger problem we have seen over the past two years -- very successful efforts by the bureaucrats, with the apparent acquiescence of the new Administration, to eliminate any tribal involvement and to revert to the old paternalistic control of Indian trust funds. I will elaborate on this serious problem and propose a solution, at the end of my testimony.

Other than this one addition and our request to insure the BIA properly meets its responsibilities, we are extremely excited and pleased by the self-determination demonstration program. We believe that many tribes will choose to exercise their options under this title.

3. DEFINING THE BIA'S SPECIFIC OBLIGATIONS TO ITS ACCOUNT HOLDERS.

While we believe many tribes will use the self-determination provisions, others will keep their money in the existing system.

Also, the half billion dollars in IIM money is likely to remain in BIA management for the foreseeable future. Since the BIA Office of Trust Fund Management will continue to be needed, ITMA strongly supports the provisions of the proposed legislation that set out in some detail what the BIA's obligations are as the trustee of Indian trust funds and what specific activities it must carry out to meet those obligations.

Attached to my testimony, as Exhibit B, are the requirements that the Comptroller of the Currency imposes by regulations on all nationally chartered private trust departments. In reviewing it you will immediately see that the requirements that S. 925 seeks to impose on the BIA trust office are far less rigorous than those the Federal government imposes on regulated private trusts. Thus even with the enactment and implementation of S. 925, Indians whose funds are managed by the BIA will continue to receive far less protection than what is guaranteed to persons using private trustees. To put it another way, even if the BIA fully implemented the provisions of Title III and V, it still would be turned down if it applied for certification from the Comptroller of the Currency. However, we consider the provisions in S. 925 a start and urge their enactment. We have been told by Departmental officials that the Department will oppose Titles III and V because they believe it is "premature". After only a month in the Department, they apparently became convinced that the answer to the trust funds problems is to move OTFM to some other Federal agency, such as the Federal Reserve. Yet neither they nor the Indian community know how the Federal Reserve operates. Nor have they begun to explore the complexities involved in moving an office such as OTFM that is tied into so many ways to other BIA operations, particularly at the agency and area levels. We believe that there needs to be careful and through research and consideration given to this issue. Of course, even once that has been done, there must be extensive consultation with the Indian community. Thus it is the idea of moving OTFM that is premature.

Last month, GAO, with ITMA's participation, began a process to explore the options for the future management of Indian trust funds, including moving it to the Federal Reserve, keeping it in the BIA but out-sourcing functions, strengthening the BIA's capability, etc. The process should be competed in the Fall. No selection from among the options would be made. The information would then be provided to the Indian community for their consideration. Given the importance of the trust funds issue, prior negative experience the Indian community has had when trust functions were moved out of the BIA (e.g., the move to MMS), and the complexity of the issue, we believe it will be several years at the best before a decision is reached. Even if the decision is to move, the new agency will want an office that is already meeting basic trust fund requirements.

Finally, while arguing that there is no purpose in spending a great deal of money to bring OTFM into compliance, the Department has not spent five minutes trying to figure out whether in fact it would be a costly process. The director of OTFM has indicated in the past that many of these requirements can be met relatively cheaply.

For these reasons, we do not believe that enactment of Titles III and V are premature. Rather, it is 150 years too late. If this opportunity is squandered, particularly on the basis of arguments from persons who have, at best, a superficial understanding of these issues, the Indian people may have to wait another 150 years before they see the same protections for their trust funds that are provided by every other trust fund institution in the country.

4. THE TRAINING COMPONENT.

Finally, we support the provisions of Title IV, which will promote increased development of Indian capability in the money management area. Through its legislative actions over the years, Congress has been extremely successful in promoting the development of Indian professionals in law, education and the health field. While the provisions of Title IV are just a beginning, we believe they are important first steps in achieving the same success in the area of money management. As tribes begin to exercise greater control over their funds, and as OTFM develops a new professionalism, there will be a significant demand for Indians with capability in this area. The provisions of Title IV will help to promote the development of this skilled group.

Concerns Regarding Implementations.

As the testimony indicates, we believe the legislation is directly in line with what the Tribes have requested and should be enacted as soon as possible. Our concerns, as indicated above, are about whether the Department will implement it properly. Our doubts are based on our two years of trying to work with the executive branch on cleaning up the trust funds program. ITMA was established in June of 1991. Over the next 12 months, we spent the bulk of our time fighting with BIA, Department-level and OMB bureaucrats who had no professional capability in the area of trust funds. As a result, they spent their time protecting their turf by trying to thwart tribal involvement, limiting inquiries into the past in order to limit the Federal government's liability, and trying to impose simplistic solutions to make it appear that they were doing something. They had absolutely no ability or desire to actually provide account holders with a true historical accounting or to make the Office of Trust Funds Management ("OTFM") work for Indian people.

In July of 1992 two very high-level officials from OMB, with professional competence in this area, became involved in our

efforts, through the good offices of Congressman Synar and then-Deputy Commissioner Dave Matheson. For the first time, our meetings were intelligent discussions about how to solve trust fund problems rather than spending hour after frustrating hour fighting through bureaucratic roadblocks. The product was the reconciliation plan that we jointly presented to you in this hearing room at a meeting you graciously called last November. While still a compromise, that reconciliation plan provided a much more indepth and sophisticated approach than the superficial approach the Departmental bureaucrats had tried to force on the Indian people.

When Mr. Clinton appointed Mr. Bruce Babbitt as the Secretary of the Interior, we were excited and expectant. Because of his well-earned reputation, we felt certain that the productive relationship developed last Fall would only get better and that we would be working with thoughtful and caring officials in the Department who, as new faces, had no skeletons in the closet they needed to hide and no fear of exposing past errors. We recognize that it may be inappropriate to draw conclusions after only five months. But the past five months have seen a regression to the situation when we first began. Tribes have been completely shut out of any involvement with the reconciliation or the restructuring of trust funds management, simplistic solutions are being sought to long-standing and complex problems, and the desire to protect the government has again taken precedent over providing a true accounting and settlement to the Indian people.

I would like to highlight just a few of the events of the past five months. I would like to be able to say that these problems resulted from the confusion that frequently accompanies a transition, the lack of staff at high levels, or from other excusable causes that will disappear once the administration gets fully staffed. But unfortunately they do not appear to be transitory problems and I am concerned that the Department is heading in a direction that, if not reversed, will be highly detrimental to the trust fund program and could lead to massive litigation against the Department. This is not to point fingers or place blame but to provide Congress with the information it needs to determine how to best insure the provisions of S. 925, and the overall trust responsibility, are properly carried out in the future.

1. Proposal to Delete the Appropriations Language Tolling the Statute of Limitations.

Over the past few years, the Interior Appropriations Act have included language that tolls the statute of limitations on claims by account holders until the reconciliation and audit is completed, because only then will the account holders be able to know if they have any claims. Yet in this year's budget request, the BIA proposed that this language be deleted, even though the reconciliation has just begun. If deleted, it would

effectively take away from the account holders any legal remedy for the errors uncovered during the reconciliation, because by the time the errors were discovered, the statute of limitations would have already run. We assumed that the old-line bureaucrats thought they could sneak this through during the confusion at the start of a new Administration. We asked Babbitt's staff to withdraw this request, but they took no action, and to this day we still have never been told whether they support or oppose the deleted proposal. Fortunately, we were told that Congressman Yates rejected the BIA request and continued to include the tolling language in the bill his committee marked up last week.

2. Creation and Defense of an Illegal Office.

The second example does not involve just acquiescence in improper behavior; it involves an active defense of illegal activity. In November 1992, the old-line Departmental bureaucrats secretly and illegally created a new office that took over a part of the functions, staff and dollars from the Office of Trust Funds Management. Splitting the functions in this manner made no managerial sense. The functions could just as easily been carried out within OTFM. However, the bureaucrats were threatened by OTFM because its director was willing to work closely with the tribes and refused to accept simplistic solutions to the trust fund problems. But regardless of the managerial wisdom of the office, the office was created illegally in three different ways:

(a) The bureaucrats moved funds from one office to another without obtaining the approval of the Appropriations Committees.

(b) The bureaucrats failed to submit the proposed new office to the Tribal-BIA Reorganization Task Force or ITMA, in violation of both organizations' charters with the Department.

(c) The bureaucrats violated Federal law by knowingly ignoring virtually every Departmental regulation setting out the procedures that must be followed when creating a new office.

Enclosed at Exhibit C are memoranda stating that these violations were done knowingly, including one from the present director of OSP, stating that he knew the actions were illegal but that he was forced to do it by Bill Bettenberg.

Again, we assumed that when the Babbitt people came on board, they would immediately eliminate the illegal office and punish the bureaucrats who acted illegally. To our disappointment, the Babbitt appointees made a conscious decision to continue the office on the grounds that it did not make a difference if the office had been created illegally, because it was now carrying out valuable functions on the reconciliation. We doubt that Secretary Babbitt, in the first few months of his tenure wanted

to send the message that he will tolerate illegal activity so long as it is functional; but that is what has been done.

Fortunately, the House Interior Appropriations Subcommittee has instructed the Department to close down the illegal office and put the functions back under OTFM where they belong. Unfortunately, the bureaucrats who carried out these illegal acts are still working for the Department and seen as valuable contributors to the new Administration.

3. Cutting Off ITMA's Involvement in the Reconciliation.

The reconciliation plan we jointly presented to you at the November 1992 meeting was developed on the understanding that the tribes would play a major role in monitoring its implementation. It was only on that basis that we agreed to it, since if improperly implemented, it will become a sham. Yet since February, we have been completely shut out of any involvement in its implementation. We no longer get regular reports on the contractor's activities or get invited to review meetings. In fact, OSP is prohibited from having any contact with ITMA unless it is first approved by the Acting Deputy Commissioner. Meanwhile the staff at OSP lack the experience or capability to properly implement the reconciliation plan agreed to last Fall. As a result, a reconciliation that may be nothing more than a pretense of a true accounting is moving forward.

4. The New Administration Refuses to Make Any Improvements in OTFM.

Last year, OTFM completed a new organization and staffing plan. Regardless of where day-to-day responsibility for the BIA trust funds in placed in the future, OTFM will need key staff, if nothing else, to monitor activities. Over the short term, the need for staff to meet their present responsibilities is critical. For example, right now, OTFM is investing billions of dollars a year without having a head of investments. It needs quality assurance staff today to carry out its part of the reconciliation and otherwise insure the integrity of the system. Without these staff persons, the account holders are not being served properly and the Federal government is risking serious liability. OTMA's new organization and staffing plan was approved by ITMA, the Reorganization Task Force, and the Congressional appropriations committees. If not all of the staff, at the very least the key managers need to be brought on board immediately. Starting last year and continuing into the new Administration, the Department and OMB have refused to authorize OTFM to fill any positions or to out-source any functions in order to upgrade its capability. In addition to putting the program at risk, his failure to act caused the deputy director, an Indian woman with extensive private trust experience -- probably the most qualified person to work for the BIA trust office, to quit in frustration. The old-liners are now trying to

drive out the OTFM director -- the only trust fund official who has ever tried to work with the tribes and provide an honest picture of what has happened and what is presently happening in the trust funds program. In the meantime, accounts holders are being ill-served by a thin patchwork crew at OTFM.

5. ITMA has urged that the BIA mail out unadjusted accounts statements to each account holder immediately, so they can begin to bring to the BIA's attention problems they can identify. The BIA has refused to do this. At a recent meeting, an Interior attorney stated that if we send out the unadjusted statements, the BIA could be subjected to extensive litigation. That was given as a reason not to do it.

6. In March, the acting Deputy Commissioner for Indian Affairs sent a memorandum to OTFM and OSP ordering them to provide no information to ITMA unless and until it is cleared by BIA Central Office. As a result, ITMA is no longer permitted to have direct communication with the offices we are supposed to be working with and monitoring. That memorandum has never been withdrawn, despite our protests. On his weekly status report to the acting Deputy Commissioner, the director regularly asks permission to release documents to ITMA (Copies at Exhibit D.)

Recommendations for the Future.

In the last two or three days before this hearing, ITMA has received extensive communication from the BIA and Department, indicating a desire to work together cooperatively. In fact, I was invited to a meeting a 7:00 a.m. this morning which I was unable to make, but we have also been asked to spend all afternoon tomorrow meeting with BIA and Department officials. I am sure that these belated efforts to reach out to ITMA are sincere. However, based on our experience of not just the past five months, but of the past two years, we are skeptical that the Department can do this even if it wants. Department officials have no background in trust fund management and, perhaps because of the many other issues on their agenda, do not have the time and patience to work carefully through this complex issue.

As indicated earlier, GAO and ITMA are in the process of exploring the possible options for the future management of trust funds. While Departmental officials have already made their minds up that the trust fund functions are to be moved to the Federal Reserve, and are impatient to move, neither GAO nor ITMA are anywhere close to having enough information on trust funds or the Federal Reserve to even begin to say with any certainty whether this is or is not the correct solution. Of course what we or the Department bureaucrats think is irrelevant since the tribal leaders and IIM account holders should have the final say on the future management of trust funds, and it will take a long and thorough process before they express their position. Regardless of what the ultimate disposition is, it will be several

years at the very least before any new option is implemented. The more immediate issue facing Congress and ITMA is how to insure the provisions of S. 925 are implemented and how to insure steady and real improvements are made in the operation of Indian trust funds during this interim period.

Our recommended solution to this interim problem is that Congress should instruct the Department to appoint a special master, reporting directly to the Secretary, to oversee OTFM, (keeping the present day-to-day director in place) supported by a board of directors or advisors composed of tribal and private sector trust officials. This will keep OTFM in the BIA for at least the time being, will increase Indian involvement and will bring in the trust fund capability at the Department level that has always been missing in the past.

This recommendation is related to my own personal view about the future of OTFM (my long-term view is one that has not been presented to or represents the view of ITMA or the tribes since there has not been an opportunity to begin a consultation process). My view is based on two basic premises. First, any change in the way trust funds are managed must be done in a manner that promotes self-determination by bringing them closer to Indian control and Indian people, not further away. One of my concerns with the idea of a move to the Federal Reserve is that the trust funds will now be one layer further away from the account holders, in an agency Indians have no experience accessing. Secondly, it must not fractionate the trust responsibility any further, since many aspects of trust fund responsibility would remain with the BIA even if OTFM were transferred somewhere else. For example, the transfer of oil and gas responsibilities to MMS has created hugh and costly problems for the Indian people. Therefore, I think the solution cannot be to simplistically pick up OTFM and drop it somewhere on the Federal agency map.

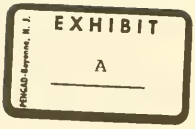
The self-determination title of S. 925 is a major step for those tribes that wish to exercise it. For those account holders who do not, the long -term solution I favor is for Indian tribes to establish local banks and national investment institutions to manage their own trust funds and those of the IIM account holders. For example, my Tribe owns the Blackfeet National Bank and we are beginning to establish a trust department to handle, initially, tribal monies, and then eventually, IIM funds. Also, a number of gaming tribes as well as the Blackfeet National Bank are discussing the establishment of various national-level investment companies to handle passive or safe investments and to engage in targeted investments to promote reservation economic development. Mr. Martin Whitman, who is also testifying today, has been assisting us think out how to do this, hopefully without the need for any Federal money or legislative authority.

By transferring trust fund management responsibilities to Indian financial institutions we will be promoting self-determination and reservation economic development. However, I recognize that it will be a number of years before all of these institutions are in place, though we hope some will be on line soon. Our recommendation for the interim period applies the same premises of promoting self-determination and avoiding fractionation as much as possible. As indicated, it calls for Congress to instruct the Secretary to hire a private trust fund expert as a special master to manage the trust fund program, in concert with a board of directors composed of Indian representatives and financial experts. The special master would not be a Federal employee but would be the equivalent of a special master appointed by a court when a party no longer deserve to manage itself. (This idea is based on one that Congressman Synar has suggested for almost a year.) The special master, (ideally, someone with stature in the financial community) likely would have more capability in the area of trust funds than do all of the bureaucrats at 18th and C Street combined. His or her role would not be to run OTFM on a day-to-day basis but to provide overall management, direction and guidance on all trust fund matters. Therefore, the special master and the board would be responsible for the reconciliation, the day-to-day management and improvement activities at OTFM (including bringing OTFM into compliance with Titles III and V of S. 925), and the implementation of the trust funds self-determination initiatives of S. 925. The special master would report directly to the Secretary, would receive a direct line item, and would be immune from the petty and negative politics of the BIA and the Department. But because it would remain within the BIA, it can maintain its ties to the other BIA programs. With an Indian majority on the board of directors, it will promote self-determination and bring the management of trust funds one step closer to the tribes. In order to avoid having to hire on a large staff that may have to be let go when the permanent solution is developed, OTFM can out-source specific functions, can hire consultants, enter into personal services contracts, and take other steps to develop capability while not becoming an entrenched bureaucracy. However, OTFM does need to hire key management-level staff so it can exercise overall control of its activities.

This idea is still in its infancy, has not been fully thought out, or subjected to rigorous criticism. Nor has it been presented to the Indian community. However, we hope to do all of these things over the next few months. If it proves valid, we will try to propose it to the House Native Affairs Subcommittee before that Committee marks up this bill. During the interim period we ask that the staff of this Committee help us think out all of the issues involved in such an approach. Hopefully, over the next few months, with the new lines of communications to the Department that have been opened this week and the continuing help from Congress, we can figure out an interim solution to

insure progress is made in the trust fund area over the next few years while we are figuring out the long-term solutions.

Thank you for this opportunity to testify and for your ongoing and strong support for the rights of Indian account holders.



PROPOSED AMENDMENT TO S. 925

Section 204 is amended by adding a new subsection

(c) at the end of the section

(c) A Tribe may, at its discretion transfer funds that it owns from the regular BIA-managed trust fund accounts to accounts established pursuant to this Title and from such account back to the BIA managed accounts at any time, subject only to such plan amendments the Secretary determines to be necessary to insure the Tribe's action remain consistent with its plan.

complete and that it have convenient evidence of its right to exercise fiduciary powers, the Comptroller of the Currency will issue a certificate to that bank showing its right to exercise the fiduciary powers theretofore granted to any of the national banks participating in the consolidation or merger.

§ 9.5 Adoption of policies and procedures with respect to brokerage placement practices.

Each national bank exercising investment discretion (as defined in 12 CFR 12.2(c)) with respect to an account shall adopt and follow written policies and procedures intended to ensure that its brokerage placement practices comply with all applicable laws and regulations. Among other relevant matters, such written policies and procedures should address, where appropriate,

(a) The selection of persons to effect securities transactions and the evaluation of the reasonableness of any brokerage commissions paid to such persons (including the factors considered in these determinations);

(b) Any acquisition of services or products, including research services, in return for brokerage commissions;

(c) The allocation of research or other services among accounts, including those which did not generate commissions to pay for such research or other services; and

(d) The need, in appropriate instances, to make disclosures concerning such policies and procedures to prospective and existing customers.

[47 FR 27831, June 25, 1982]

§ 9.6 [Reserved]

§ 9.7 Administration of fiduciary powers.

(a)(1) The board of directors is responsible for the proper exercise of fiduciary powers by the bank. All matters pertinent thereto, including the determination of policies, the investment and disposition of property held in a fiduciary capacity, and the direction and review of the actions of all officers, employees, and committees utilized by the bank in the exercise of its fiduciary powers, are the responsibility of the board. In discharging this responsibility, the board of directors may assign, by action duly entered in the minutes, the administration of such of the bank's fiduciary powers as it may consider proper to assign to such director(s), officer(s), employee(s) or committee(s) as it may designate.

(2) No fiduciary account shall be accepted without the prior approval of the board, or of the director(s), officer(s) or committee(s) to whom the board may have designated the performance of that responsibility. A written record shall be made of such acceptances and of the relinquishment or closing out of all fiduciary accounts. Upon the acceptance of an account for which the bank has investment responsibilities a prompt review of the assets shall be made. The board shall also ensure that at least once during every calendar year thereafter, and within 15 months of the last review, all the assets held in or for each fiduciary account where the bank has investment responsibilities are reviewed to determine the advisability of retaining or disposing of such assets.

(b) All officers and employees taking part in the operation of the trust department shall be adequately bonded.

(c) Every national bank exercising fiduciary powers shall designate, employ or retain legal counsel who shall be readily available to pass upon fiduciary matters and to advise the bank and its trust department.

(d) The trust department may utilize personnel and facilities of other departments of the bank, and other departments of the bank may utilize personnel and facilities of the trust department only to the extent not prohibited by law. Every national bank exercising fiduciary powers shall adopt written policies and procedures to ensure that the Federal securities laws are complied with in connection with any decision or recommendation to purchase or sell any security. Such policies and procedures, in particular, shall ensure the national bank trust departments shall not use material inside information in connection with any decision or recommendation to purchase or sell any security.

[28 FR 3309, Apr. 5, 1963, as amended at 43 FR 6759, Feb. 16, 1978]

§ 9.8 Books and accounts.

(a) Every national bank exercising fiduciary powers shall keep its fiduciary records separate and distinct from other records of the bank. All fiduciary records shall be so kept and retained for such time as to enable the bank to furnish such information or reports with the Comptroller of the Currency. The fiduciary records shall contain full information relative to each account.

(b) Every such national bank shall keep an adequate record of all pending litigation to which it is a party in connection with its exercise of fiduciary powers.

(c) Solely for purposes of examination by the Comptroller of the Currency, a national bank shall retain the records required by this part for a period of 3 years from the later of the termination of the fiduciary account relationship to which the records relate or of litigation relating to such account, unless applicable law specifically prescribes a different period.

[28 FR 3309, Apr. 5, 1963, as amended at 47 FR 27831, June 25, 1982]

§ 9.9 Audit of trust department.

A committee of directors, exclusive of any active officers of the bank, shall at least once during each calendar year and within 15 months of the last such audit, make suitable audits of the trust department or cause suitable audits to be made by auditors responsible only to the board of directors, and at such time shall ascertain whether the department has been administered in accordance with law, this part and sound fiduciary principles. The board of directors may elect, in lieu of such periodic audits, to adopt an adequate continuous audit system. A report of the audits and examination required under this section, together with the action taken thereon, shall be noted in the minutes of the board of directors.

§ 9.10 Funds awaiting investment or distribution.

(a) Funds held by a national bank in a fiduciary capacity which are awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. Each national bank exercising fiduciary powers shall adopt and follow written policies and procedures intended to ensure that the maximum rate of return available for trust-quality, short-term investments is obtained upon funds so held, consistent with the requirements of the governing instrument and local law. Such policies and procedures shall take into consideration all relevant factors, including but not limited to the anticipated return that could be obtained while the cash remains uninvested or undistributed, the cost of investing such funds, and the anticipated need for the funds.

(b) Funds held in trust by a national bank, including managing agency accounts, awaiting investment or distribution may, unless prohibited by the instrument creating the trust or by local law, be deposited in the commercial or savings or other department of the bank: *Provided*, That it shall first set aside under control of the trust department as collateral security:

(1) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest; or

(2) Readily marketable securities of the classes in which state banks exercising fiduciary powers are authorized or permitted to invest trust funds under the laws of the State in which such national bank is located; or

(3) Other readily marketable securities that qualify as investment securities pursuant to the Investment Securities Regulation of the Comptroller of the Currency, 12 CFR, chapter I, part 1. The securities so deposited or securities substituted therefor as collateral shall at all times be at least equal in face value to the amount of trust funds so deposited, but such security shall not be required to the extent that the funds so deposited are insured by the Federal Deposit Insurance Corporation. The requirements of this section are met when qualifying assets of the bank are pledged to secure a deposit in compliance with

local law, and no duplicate pledge shall be required in such case.

[28 FR 3309, Apr. 5, 1963, as amended at 47 FR 27831, June 25, 1982]

§ 9.11 Investment of funds held as fiduciary.

(a) Funds held by a national bank in a fiduciary capacity shall be invested in accordance with the instrument establishing the fiduciary relationship and local law. When such instrument does not specify the character or class of investments to be made and does not vest in the bank, its directors or its officers a discretion in the matter, funds held pursuant to such instrument shall be invested in any investment in which corporate fiduciaries may invest under local law.

(b) If, under local law, corporate fiduciaries appointed by a court are permitted to exercise a discretion in investments, or if a national bank acting as fiduciary under appointment by a court is vested with a discretion in investments by an order of such court, funds of such accounts may be invested in any investments which are permitted by local law. Otherwise, a national bank acting as fiduciary under appointment by a court must make all investments of funds in such accounts under an order of that court. Such orders in either case shall be preserved with the fiduciary records of the bank.

(c) The collective investment of funds received or held by a national bank as fiduciary is governed by § 9.18.

(d) As a part of each examination of the trust department of a national bank and as provided by the Comptroller's Handbook for National Trust Examiners, the Comptroller of the Currency will examine the investments held by such bank as fiduciary, including the investment of funds under the provisions of § 9.18, in order to determine whether such investments are in accordance with law, this regulation and sound fiduciary principles.

[28 FR 3309, Apr. 5, 1963, as amended at 42 FR 65139, Dec. 30, 1977]

§ 9.12 Self-dealing.

(a) Unless lawfully authorized by the instrument creating the relationship, or by court order or by local law, funds held by a national bank as fiduciary shall not be invested in stock or obligations of, or property acquired from, the bank or its directors, officers, or employees, or individuals with whom there exists such a connection, or organizations in which there exists such an interest, as might affect the exercise of the best judgment of the bank in acquiring the property, or in stock or obligations of, or property acquired from, affiliates of the bank or their directors, officers or employees.

(b) Property held by a national bank as fiduciary shall not be sold or transfered, by loan or otherwise, to the bank or its directors, officers, or employees, or to individuals with whom there exists such a connection, or organizations in which there exists such an interest, as might affect the exercise of the best judgment of the bank in selling or transferring such property, or to affiliates of the bank or their directors, officers or employees, except:

(1) Where lawfully authorized by the instrument creating the relationship or by court order or by local law;

(2) In cases in which the bank has been advised by its counsel in writing that it has incurred as fiduciary a contingent or potential liability and desires to relieve itself from such liability, in which case such a sale or transfer may be made with the approval of the board of directors, *Provided*, That in all such cases the bank, upon the consummation of the sale or transfer, shall make reimbursement in cash at no loss to the account;

(3) As is provided in § 9.18(b)(8)(ii);

(4) Where required by the Comptroller of the Currency.

(c) Except as provided in § 9.10(b), funds held by a national bank as fiduciary shall not be invested by the purchase of stock or obligations of the bank or its affiliates unless authorized by the instrument creating the relationship or by court order or by local law: *Provided*, That if the retention of stock or obligations of the bank or its affiliates is authorized by the instrument creating the relationship or by court order or by local law, it may exercise rights to purchase its own stock or securities convertible into its own

stock when offered pro rata to stockholders, unless such exercise is forbidden by local law. When the exercise of rights or receipt of a stock dividend results in fractional share holdings, additional fractional shares may be purchased to complement the fractional shares so acquired.

(d) A national bank may sell assets held by it as fiduciary in one account to itself as fiduciary in another account if the transaction is fair to both accounts and if such transaction is not prohibited by the terms of any governing instrument or by local law.

(e) A national bank may make a loan to an account from the funds belonging to another such account, when the making of such loans to a designated account is authorized by the instrument creating the account from which such loans are made, and is not prohibited by local law.

(f) A national bank may make a loan to an account and may take as security therefore assets of the account, provided such transaction is fair to such account and is not prohibited by local law.

[28 FR 3309, Apr. 5, 1963, as amended at 37 FR 24161, Nov. 15, 1972]

§ 9.13 Custody of investments.

(a) The investments of each account shall be kept separate from the assets of the bank, and shall be placed in the joint custody or control of not less than two of the officers or employees of the bank designated for that purpose by the board of directors of the bank or by one or more officers designated by the board of directors of the bank; and all such officers and employees shall be adequately bonded. To the extent permitted by law, a national bank may permit the investments of a fiduciary account to be deposited elsewhere.

(b) The investments of each account shall be either:

(1) Kept separate from those of all other accounts, except as provided in § 9.18, or

(2) Adequately identified as the property of the relevant account.

[28 FR 3309, Apr. 5, 1963, as amended at 37 FR 24161, Nov. 15, 1972]

§ 9.14 Deposit of securities with state authorities.

Whenever the local law requires corporations acting as fiduciary to deposit securities with the state authorities for the protection of private or court trusts, every national bank in that State authorized to exercise fiduciary powers shall, before undertaking to act in any fiduciary capacity, make a similar deposit with the state authorities. If the State authorities refuse to accept such a deposit, the securities shall be deposited with the Federal Reserve Bank of the district in which such national bank is located, and such securities shall be held for the protection of private or court trusts with like effect as though the securities had been deposited with the state authorities.

§ 9.15 Compensation of bank.

(a) If the amount of the compensation for acting in a fiduciary capacity is not regulated by local law or provided for in the instrument creating the fiduciary relationship or otherwise agreed to by the parties, a national bank acting in such capacity may charge or deduct a reasonable compensation for its services. When the bank is acting in a fiduciary capacity under appointment by a court, it shall receive such compensation as may be allowed or approved by that court or by local law.

(b) No national bank shall, except with the specific approval of its board of directors, permit any of its officers or employees, while serving as such, to retain any compensation for acting as a cofiduciary with the bank in the administration of any account undertaken by it.

§ 9.16 Receivership or voluntary liquidation of bank.

(a) Whenever a receiver is appointed for a national bank by the Comptroller of the Currency, such receiver shall, pursuant to the instructions of the Comptroller and to the orders of the court having jurisdiction, proceed to close such accounts as can be closed promptly and transfer all other accounts to substitute fiduciaries.

(b) Whenever a national bank exercising fiduciary powers is placed in voluntary liquidation, the liquidating agent shall, in accordance with the local law, proceed at once to liquidate the affairs of the trust department as follows:

(1) All trusts and estates over which a court is exercising jurisdiction shall be closed or disposed of as soon as practicable in accordance with the orders or instructions of such court;

(2) All other accounts which can be closed promptly shall be closed as soon as practicable and final accounting made therefor, and all remaining accounts shall be transferred by appropriate legal proceedings to substitute fiduciaries.

§ 9.17 Surrender or revocation of fiduciary powers.

(a) Any national bank which has been granted the right to exercise fiduciary powers and which desires to surrender such right shall file with the Comptroller of the Currency a certified copy of the resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller shall make an investigation and if satisfied that the bank has been discharged from all fiduciary duties which it has undertaken, shall issue a certificate to such bank certifying that it is no longer authorized to exercise fiduciary powers.

(b) If, in the opinion of the Comptroller, a national bank is unlawfully or unsoundly exercising, or has unlawfully or unsoundly exercised, or has failed for a period of five consecutive years to exercise its fiduciary powers, or otherwise fails or has failed to comply with any of the requirements set forth in 12 U.S.C. 92a, the Comptroller may, in accordance with the provisions of that section, revoke the fiduciary powers granted to the bank.

[47 FR 27832, June 25, 1982]

§ 9.18 Collective investment.

(a) Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively:

(1) In a common trust fund maintained by the bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as trustee, executor, administrator, guardian or custodian under a uniform gifts to minors act.

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code.

(b) Collective investments of funds or other property by national banks under paragraph (a) of this section (referred to in this paragraph as "collective investment funds") shall be administered as follows:

(1) Each collective investment fund shall be established and maintained in accordance with a written plan (referred to herein as the Plan) which shall be approved by a resolution of the bank's board of directors and filed with the Comptroller of the Currency. The Plan shall contain appropriate provisions not inconsistent with the rules and regulations of the Comptroller of the Currency as to the manner in which the fund is to be operated, including provisions relating to the investment powers and a general statement of the investment policy of the bank with respect to the fund; the allocation of income, profits and losses; the terms and conditions governing the admission or withdrawal of participations in the fund; the auditing of accounts of the bank with respect to the fund; the basis and method of valuing assets in the fund, setting forth specific criteria for each type of asset; the minimum frequency for valuation of assets of the fund; the period following each such valuation date during which the valuation may be made (which period in usual circumstances should not exceed 10 business days); the basis upon which the fund may be terminated; and such other matters as may be necessary to define clearly the rights of participants in the fund. Except as otherwise provided in paragraph (b)(15) of this section, fund assets shall be valued at market value unless such value is not readily ascertainable, in which case a fair value determined in good faith by the fund trustees may be used. A copy of the Plan shall be available at the principal

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office of the bank for inspection during all banking hours, and upon request a copy of the Plan shall be furnished to any person.

(2) Property held by a bank in its capacity as trustee of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation under any provisions of the Internal Revenue Code may be invested in collective investment funds established under the provisions of paragraph (a)(1) or (2) of this section, subject to the provisions herein contained pertaining to such funds, and may qualify for tax exemption pursuant to section 584 of the Internal Revenue Code. Assets of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation by reason of being described in section 401 of the Code may be invested in collective investment funds established under the provisions of paragraph (a)(2) of this section if the fund qualifies for tax exemption under Revenue Ruling 56-267, and following rulings.

(3) All participants in the collective investment fund shall be on the basis of a proportionate interest in all of the assets. In order to determine whether the investment of funds received or held by a bank as fiduciary in a participation in a collective investment fund is proper, the bank may consider the collective investment fund as a whole and shall not, for example, be prohibited from making such investment because any particular asset is nonincome producing. .

(4) Not less frequently than once during each period of 3 months, a bank administering a collective investment fund shall determine the value of the assets in the fund as of the date set for the valuation of assets. No participation shall be admitted to or withdrawn from the fund except—

(i) On the basis of such valuation and

(ii) As of such valuation date.

No participation shall be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action shall have been entered on or before the valuation date in the fiduciary records of the bank and approved in such manner as the board of directors shall prescribe. No requests or notices may be cancelled or countermanded after the valuation date. If a fund described in paragraph (a)(2) of this section is to be invested in real estate or other assets which are not readily marketable, the bank may require a prior notice period, not to exceed 1 year, for withdrawals.

(5)(i) A bank administering a collective investment fund shall at least once during each period of 12 months cause an adequate audit to be made of the collective investment fund by auditors responsible only to the board of directors of the bank. In the event such audit is performed by independent public accountants, the reasonable expenses of such audit may be charged to the collective investment fund.

(ii) A bank administering a collective investment fund shall at least once during each period of 12 months prepare a financial report of the fund. This report, based upon the above audit, shall contain a list of investments in the fund showing the cost and current market value of each investment; a statement for the period since the previous report showing purchases, with cost; sales, with profit or loss and any other investment changes; income and disbursements; and an appropriate notation as to any investments in default.

(iii) The financial report may include a description of the fund's value on previous dates, as well as its income and disbursements during previous accounting periods. No predictions or representations as to future results may be made. In addition, as to funds described in paragraph (a)(1) of this section, neither the report nor any other publication of the bank shall make reference to the performance of funds other than those administered by the bank.

(iv) A copy of the financial report shall be furnished, or notice shall be given that a copy of such report is available and will be furnished without charge upon request, to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. A copy of such financial report may be furnished to prospective cus-

tomers. The cost of printing and distribution of these reports shall be borne by the bank. In addition, a copy of the report shall be furnished upon request to any person for a reasonable charge. The fact of the availability of the report for any fund described in paragraph (a)(1) of this section may be given publicity solely in connection with the promotion of the fiduciary services of the bank.

(v) Except as herein provided, the bank shall not advertise or publicize its collective investment fund(s) described in paragraph (a)(1) of this section.

(6) When participations are withdrawn from a collective investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind: *Provided*, That all distributions as of any one valuation date shall be made on the same basis.

(7) If for any reason an investment is withdrawn in kind from a collective investment fund for the benefit of all participants in the fund at the time of such withdrawal and such investment is not distributed ratably in kind, it shall be segregated and administered or realized upon for the benefit ratably of all participants in the collective investment fund at the time of withdrawal.

(8)(i) No bank shall have any interest in a collective investment fund other than in its fiduciary capacity. Except for temporary net cash overdrafts or as otherwise specifically provided herein, it may not lend money to a fund, sell property to, or purchase property from a fund. No assets of a collective investment fund may be invested in stock or obligations, including time or savings deposits, of the bank or any of its affiliates: *Provided*, That such deposits may be made of funds awaiting investment or distribution. Subject to all other provisions of this part, funds held by a bank as fiduciary for its own employees may be invested in a collective investment fund. A bank may not make any loan on the security of a participation in a fund. If because of a creditor relationship or otherwise the bank acquires an interest in a participation in a fund, the participation shall be withdrawn on the first date on which such withdrawal can be effected. However, in no case shall an unsecured advance until the time of the next valuation date to an account holding a participation be deemed to constitute the acquisition of an interest by the bank.

(ii) Any bank administering a collective investment fund may purchase for its own account from such fund any defaulted fixed income investment held by such fund, if in the judgment of the board of directors the cost of segregation of such investment would be greater than the difference between its market value and its principal amount plus interest and penalty charges due. If the bank elects to so purchase such investment, it must do so at its market value or at the sum of cost, accrued unpaid interest, and penalty charges, whichever is greater.

(9) Except in the case of collective investment funds described in paragraph (a)(2) of this section:

(i) No funds or other property shall be invested in a participation in a collective investment fund if as a result of such investment the participant would have an interest aggregating in excess of 10 percent of the then market value of the fund: *Provided*, That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such accounts shall be considered as one;

(ii) No investment for a collective investment fund shall be made in stocks, bonds, or other obligations of any one person, firm, or corporation if as a result of such investment the total amount invested in stocks, bonds, or other obligations issued or guaranteed by such person, firm or corporation would aggregate in excess of 10 percent of the then market value of the fund: *Provided*, That this limitation shall not apply to investments in direct obligations of the United States or other obligations fully guaranteed by the United States as to principal and interest;

(iii) A bank administering a collective investment fund shall maintain, in cash and readily marketable invest-

[48 FR 30599, July 1, 1983. Redesignated and amended at 49 FR 50605, Dec. 31, 1984]

§ 8.8 Notice of Comptroller of the Currency fees.

(a) *December notice of fees.* A "Notice of Comptroller of the Currency Fees" shall be published no later than the first business day in December of each year for fees to be charged by the Office during the upcoming year. These fees will be effective January 1 of that upcoming year.

(b) *Interim notice of comptroller of the Currency fees.* The Office may issue an "Interim Notice of Comptroller of the Currency Fees" or issue an amended "Notice of Comptroller of the Currency Fees" from time to time throughout the year as necessary. Interim or amended notices will be effective 30 days after issuance.

[55 FR 49842, Nov. 30, 1990]

§ 8.15 Annual franchise fees.

(a) *Fees.* National banks that are registered or on file as municipal and/or government securities dealers shall pay by January 31 an annual franchise fee covering each dealer activity. The Office will set the franchise fees for those activities at an amount designed to allocate supervisory costs to banks engaging in dealer activities.

(b) *Notice of Comptroller of the Currency Fees.* The OCC publishes the franchise fee schedule in the Notice of Comptroller of the Currency Fees described in § 8.8.

(c) *Exception.* The requirements of this section do not apply to a national bank subsidiary or affiliate that is registered or on file as either a municipal or government securities dealer.

[55 FR 49842, Nov. 30, 1990]

PART 9—FIDUCIARY POWERS OF NATIONAL BANKS AND COLLECTIVE INVESTMENT FUNDS

Sec.

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AUTHORITY: Sec. 1, 77 Stat. 668; 12 U.S.C. 92a; and R.S. 5240 as amended (12 U.S.C. 481).

SOURCE: 28 FR 3309, Apr. 5, 1963, unless otherwise noted.

§ 9.1 Definitions.

For the purposes of this part, the term:

(a) *Account* means the trust, estate or other fiduciary relationship which has been established with a bank;

(b) *Fiduciary* means a bank undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, managing agent and any other similar capacity;

(c) *Fiduciary powers* means the power to act in any fiduciary capacity authorized by the Act of September 28, 1962, 76 Stat. 668, 12 U.S.C. 92a. Under that Act, a national bank may be authorized to act, when not in contravention of local law, as trustee, executor, administrator, registrar of

341-035 O—93——5

stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity which State banks, trust companies, or other corporations which come into competition with the national bank may exercise under local law;

(d) *Fiduciary records* means all matters which are written, transcribed, recorded, received or otherwise come into the possession of a bank and are necessary to preserve information concerning the acts and events relevant to the fiduciary activities of a bank;

(e) *Guardian* means the guardian or committee, by whatever name employed by local law, of the estate of an infant, an incompetent individual, an absent individual, or a competent individual over whose estate a court has taken jurisdiction, other than under bankruptcy or insolvency laws;

(f) *Investment authority* means the responsibility conferred by action of law or a provision of an appropriate governing instrument to make, select or change investments, review investment decisions made by others, or to provide investment advice or counsel to others;

(g) *Local law* means the law of the State or other jurisdiction governing the fiduciary relationship;

(h) *Managing agent* means the fiduciary relationship assumed by a bank upon the creation of an account which names the bank as agent and confers investment discretion upon the bank;

(i) *State bank* means any bank, trust company, savings bank or other banking institution, which is not a national bank and the principal office of which is located in the District of Columbia, any State, commonwealth, or territorial possession of the United States;

(j) *Trust department* means that group or groups of officers and employees of a bank organized under the supervision of officers or employees to whom are designated by the board of directors the performance of the fiduciary responsibilities of the bank, whether or not the group or groups are so named.

(k) *Bank* shall include two or more banks which are members of the same affiliated group with respect to any fund established pursuant to § 9.18 of which any of such affiliated banks is trustee, or two or more of such affiliated banks are co-trustees.

(l) *Custodian under a uniform gifts to minors act* means an account established pursuant to a state law which is substantially similar to the Uniform Gifts to Minors Act as published by the American Law Institute and with respect to which the bank operating such account has established to the satisfaction of the Secretary of the Treasury that it has duties and responsibilities similar to duties and responsibilities of a trustee or guardian.

[28 FR 3309, Apr. 5, 1963, as amended at 37 FR 24161, Nov. 15, 1972; 39 FR 28145, Aug. 5, 1974; 41 FR 47937, Nov. 1, 1976; 47 FR 27831, June 25, 1982]

§ 9.2 Applications.

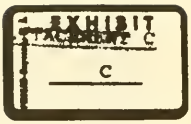
A national bank desiring to exercise fiduciary powers shall file an application with the Comptroller of the Currency pursuant to 12 CFR 5.26, but an application to exercise fiduciary powers by a national bank limited to trust powers shall be filed pursuant to 12 CFR 5.22.

[47 FR 22343, May 24, 1982]

§ 9.3 [Reserved]

§ 9.4 Consolidation or merger of two or more national banks.

Where two or more national banks consolidate or merge, and any one of such banks has, prior to such consolidation or merger, received a permit from the Board of Governors of the Federal Reserve System or the Comptroller of the Currency to exercise fiduciary powers which is in force at the time of the consolidation or merger, the rights existing under such permit pass to the resulting bank, and the resulting bank may exercise such fiduciary powers in the same manner and to the same extent as the bank to which such permit was originally issued; and no new application to continue to exercise such powers is necessary. However, where the name or charter number of the resulting bank differs from that of the bank to which the right to exercise fiduciary power was originally granted, in order that the records of the resulting bank may be



MAR 2 2 1993

MEMORANDUM FOR THE FILE:

In October, 1992, Joe Christie provided a draft DM-130 for the Special Projects offi to the Acting Director of Administration, Kathy Mealy. Ms. Mealy got together with B Bettenberg and Janet Bishop, of DOI PMB. Mr. Christie was advised that a DM-1 was not necessary, because it would take too long, and as it was only an extension of t Deputy Commissioner's office, that it could be established by memorandu Subsequently, on November 23, 1993, the Deputy Commissioner established the Spec Projects Team.

Mr. Christie was opposed to this action all along. He argued that the best way to dc was a DM-130, but he was overruled by Mr. Bettenberg.

At this point in time, it would be April, 1993 before another DM-130 could be provic to the Director, Office of Management and Administration. This would be six mon after the original DM-130 was proposed but disapproved. It would then take a minim six additional months for approval, and another possible three months to advertise a hire the personnel. This timeframe is unacceptable for the schedules we are n working.

The Secretary has the reconciliation of Trust Funds as one of his highest priorities. T staff now detailed to the project would leave for other positions if we waited almos year to hire, when we have already waited six months. We cannot afford to tell Secretary that we cannot continue this project because of poor management in the Off of Management and Administration.

The logical course is to go with the November 23, 1992 memorandum as the sou document establishing the office. In the interim, we will also propose another DM-1 to resolve it on a permanent basis. However, we are unwilling to wait for organizatio approval for this DM-130. We must proceed now with the approval already granted months ago.

ATTACHMENT A

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:

OCT 19 1992

Memorandum

To: The Record

From: Management Analyst

Subject: 130 DM Change/Secretary's Order for Special Projects Staff

On this date I was called by Ms. Kathleen Mealy, PAM, regarding Secretary's Order that had been prepared by Mr. Joe Christie, w technical assistance from this office, to establish a Spec Projects Staff in the Office of the Commissioner. Ms. Mealy sta that it would not be necessary to prepare any formal organizatio materials or obtain clearances for the staff office since not staff offices, including hers, were published in the Departmen Manual. She called Mr. Christie's staff an "insignificant staf.

I stated that Mr. Christie is an SES official, and he has b given approximately an $8,000,000 budget to establish his off and begin his first special project related to the trust fu reconciliation. I could not consider this as an "insignifica effort, concerning the size and seriousness of the mission. addition, Mr. Christie would be stationed in Albuquerque, Mexico, with a four or five person staff to assist him in his fi project dealing with reconciliation of trust funds.

This office, i.e., the Division of Management Support, Office Administration, Office of Management and Administration, has problem in establishing the Special Projects Staff through internal 5 BIAM procedures, as long as BIA obtains a waiver f the Department of all requirements under 101 DM, 3.2 B, wh clearly states that "the Departmental Manual must include functional statement and location of any headquarters program technical or administrative organizational unit that is not loca in the headquarters city." The 5 BIAM cannot be published unl it is linked to a legal 130 DM, per regulation, legislation, Departmental and BIA guidelines. It was my impression that Christie also believed that his function clearly fits provisions of this Departmental requirement, and in good faith, tried to comply with the Departmental requirements. I a explained that we could not begin to implement his function unt

a Secretary's Order or a DM release had been signed, as required
101 DM 3.4B(3), which states: "No interim organizational chanc
assignments of personnel, or reprogramming of funds and ot
resources related to organizational changes at levels affecting
Departmental Manual will be implemented until a DM release c
Secretary's Order has been approved."

Ms. Mealy stated that she had no knowledge of these Departmer
requirements and that she would appreciate it if I would telefa
copy to her. She stated that she would discuss the matter with
Bettenberg and Mr. Kay. I telefaxed the manual parts to Ms. Mea
as she had requested.

Later that day, Ms. Mealy called me to state that she had discus
the matter with Mr. William Bettenberg, Mr. Ed Kay, Mr. Os
Mueller, Ms. Janet Bishop, and Mr. Schrott. All had agreed t
the function assigned to Mr. Christie was not of a "signific
staff nature" and that they did not want to have to go through
congressional review and task force review process outlined in
budget language as required for a management improvement effc
Therefore, since not all staffs in the Department are in the
DM, or on Secretary's Orders (although Ms. Mealy stated that
own staff office was only established through a Secretary's Or
that had been amended on numerous occasions and not published
the Departmental Manual), the Special Projects Staff was not
official staff and did not require any manual releases, incluc
a BIAM release.

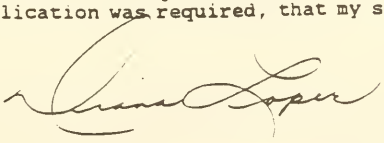
I advised Ms. Mealy that there were four or five additional st
projected for permanent assignment to this staff office,
Albuquerque under the current proposal. Ms. Mealy stated that t
was not a permanent staff since it would not be there for a l
time. I asked her how long the project was anticipated to la
She stated that it would be seven to ten years and would
comparable to the current Department staff in Albuquerque detai
to BIA Financial Management positions.

I informed Ms. Mealy that under Office of Personnel Manager
regulations and FPM requirements, no Federal employee may
detailed more than one year, and then only in 120 day incremen
I also explained that any organizational element that would l
over one year would, accordingly, be a permanent organization
that an organizational element projected for seven to ten ye
would not only be permanent, but would most likely be m
permanent than any organizational element in the history of
BIA, since organizational stability has never been BIA's str
suit.

Ms. Mealy did not understand why I could not consider a 7-to-t
year organization as temporary in nature. She also denied t
this would be a staff office, and that only Mr. Christie would
assigned to the task. I informed her that the task of reconcili

trust funds management records was gargantuan task and could not accomplished by one individual, regardless of intellectual abili organizational placement, or rank.

The conversation ended with my informing Ms. Mealy that if organizational publication was required, that my services would be necessary.



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:

MAR 22 1993

Memorandum

To: Special Assistant to the Deputy Commissioner (Special Projects Team)

From: Acting Deputy Commissioner of Indian Affairs

Subject: Submission of Materials

It has been brought to my attention that various materials have been directly circulated by the Special Projects Team to the Department's Office of Financial Management, the Office of Management and Budget (OMB), the InterTribal Monitoring Association (ITMA) and possibly others for review and comment.

As you know, issues associated with trust funds management are of a high priority with the Bureau of Indian Affairs, and this area constitutes a high risk material weakness and critical area of concern to Indian account holders, the Department, the Office of Management and Budget, and the Congress. Therefore, materials developed by the Special Projects Team relating to the improvement initiatives we are undertaking in this area, are of a particularly sensitive nature and should be coordinated through me prior to issuance to external parties.

I am hereby directing that all issue papers, briefing materials, reports, proposals, and other materials (whether in draft or proposed final format) requiring circulation for review, solicitation of comments, or for the purpose of providing information to others under the Special Projects Team, as noted above, be directly sent to me first for consideration and further coordination.

RECEIVED

MAR 2 [illegible] 1993

SUPERVISED ACCOUNTS

REPORT TO DEPUTY COMMISSIONER
SPECIAL PROJECTS OFFICE
MAY 28, 1993

DEPUTY COMMISSIONER, ACTIONS REQUIRED:

GENERAL MATTERS:

1. SPT received memorandum of guidance from the DCIA on contents of the May 4 plan for Prior Year Document Sorting Process. As noted, SPT has made some adjustments to the sorting operation. SPT will review the document in detail for further discussion.

2. Need approval for expenditure of systems appropriated funds for reconciliation effort. Request now over two weeks in review.

3. Need action on filling of positions requested. SPT advised that Interior clearance of GM-15 position of Special Assistant is now delayed because Interior wants additional accounting worked into the position. SPT working with Willie Collins in Personnel.

4. Received approval on May 28th to publish the Reconciliation Certification Contract in the Commerce Business Daily pending changes directed by OMB. Original submission was on May 26th. Any delay will cause a delay in the award date. Copy of memo and critical path chart are attached.

5. Additional records storage/staging space has been requested by memorandum to the Albuquerque Area Director. The formalized request is to be forwarded for approval to the Division of Property Management in the Central Office on May 28, 1993. Needs coordination for immediate turn-around and approval. Space is needed to handle the large numbers of boxes being sorted and stored in Albuquerque for the reconciliation.

6. SPT and OTFM participated in a GAO entrance conference on Monday, May 24, for the beginning of the review of operations necessary to outline all impacts of moving trust funds to the Federal Reserve or other Federal agency.

CLEARANCE REQUESTED UNDER THE MARCH 22, 1993 DIRECTIVE:

1. SPT response to Senate Appropriation Hearing Questions, submitted to DCIA on May 25, 1993.

2. Request for final approval of the response package for the Investment Pilot is being sent express today. SPT recommends

that the pilot is ready for implementation, and should be handed over to the OTFM at this time. OTFM has indicated that they are unable to implement as critical investment positions are unfilled. Direction is needed for proceeding with implementation.

INTERTRIBAL MONITORING ASSOCIATION (ITMA):

1. SPT received a letter from the ITMA explaining their absence from the IIM and Strategic Plan II meetings in Albuquerque two weeks ago. The problem expressed was that there was a unilateral decision changing an IIM workgroup agreement that the next meeting would be via videoconference which would have saved ITMA travel funds which are limited. Cobell claims that ITMA was not consulted or contacted about the change, which violates group team agreements. She indicated strong feelings about whether the ITMA version or BIA version of concept paper would be the basic work document, citing basic disagreements.

   They also raised the question of the legitimacy of the SPT, and stated that they were not consulted when the creation of the SPT was under consideration. They intended to seek guidance from the Reorganization Task Force during this week's meeting in Montana. A reply to the "charges" has been drafted and is under review within the SPT. (Copy attached)

ARTHUR ANDERSEN & CO.:

1. Document acquisition and sorting: A plan was developed by the SPT dated May 4, 1993 which contained the timelines and milestones for critical tasks which must be accomplished to meet the April, 1994 deadline to complete tribal accounts reconciliation.

   The global effort has two stages: Stage I is the accumulation and sorting of all known records. That is, all boxed and stored records for the fiscal years 1973 through 1992. Memos were sent to nine areas requesting specific records to be shipped by May 11, 1993. A report showing the current status of area response is attached. The May 4 plan called for using Arthur Andersen & Co. staff to assist in sorting. This part of the plan received negative response from the new Acting DCIA, with instructions to have all SPT staff do the sorting. The SPT responded by memorandum requesting an on-site review of needs. In response to this, Ted Woronka, DOI, was contacted by Tom Thompson and asked to review the needs and recommendations and to make his own recommendation. His final recommendation was that the SPT acquire additional professional-level document sorting and preparation help through use of a relatively new authority to contract for the help from firms specializing in this service. Woronka

RED LAKE BAND
of CHIPPEWA INDIANS

Red Lake, MN 56671 Phone 218-679-3341 • Fax 218-679-3378

DIVISION:

TRIBAL COUNCIL
Organized April 18, 1918
(Revised Constitution & By-Laws, January 6, 1959)

OFFICERS:
GERALD F. BRUN, Chairman
DOBBY WHITEFEATHER, Secretary
JAMES STRONG, Treasurer

DISTRICT REPRESENTATIVES:
ROMAN P. STATELY, JR.
FABIAN COOK
LORNA L. FAIRBANKS
PRESTON GRAVES
LAWRENCE BEDEAU
ALLEN ENGLISH, JR.
TOM J. STILLDAY, JR
CLIFFORD C. HARDY

ADVISORY COUNCIL:
7 HEREDITARY CHIEFS

CHIEF COUNCIL OF 1889
May-dway-gwa-no-nind
Nah-gaun-e-gwon-abe
Maya-ee-co-caw-ay
Ahnah-me-ay-ge-shig
Naw-ay-Lah-wowb
Nah-wah-quay ge-shig

TESTIMONY OF THE HONORABLE GERALD F. BRUN
TRIBAL COUNCIL CHAIRMAN
RED LAKE BAND OF CHIPPEWA INDIANS

before the

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

June 22, 1993 hearing

Concerning BIA Handling of Indian Trust Funds and S. 925

Introduction

Good morning, Mr. Chairman, and distinguished members of this Committee. I am glad to have this chance to tell you the concerns my Tribe has with how the BIA has mismanaged our trust funds and to voice our support for S. 925, the Native American Trust Fund Accounting and Management Reform Act of 1993.

For decades, Red Lake has had a continuing problem -- the BIA has illegally taken money from Red Lake trust funds BIA holds and has spent that money for BIA purposes without proper authorization from the Tribe. When the BIA refused to acknowledge this, we proved it in court in the 1980s through the records of a BIA employee. The BIA still has not admitted the truth of the court's findings. Instead it continues to fight us on appeal, refusing

to correct the errors an independent C.P.A. auditor, hired by the BIA under court order, found BIA made from 1968 to 1984 in its accounting of our funds.

BIA Withholds Information

Despite what they tell Congress, BIA has failed to adequately inform the Tribe in a timely fashion about what BIA is doing with our trust funds. This is the case even though we repeatedly ask for information. For example, in November, 1988 we discovered BIA had taken more than one million dollars of our trust money out of certificates of deposit without advance notice to the Tribe. We had to send our accountants and lawyers to BIA's Albuquerque office to insist that we see for ourselves any paper work substantiating where these funds were placed and at what loss to the Tribe. Our review discovered BIA accounting errors that, as usual, were not in our favor. We have reason to believe the Tribe lost valuable interest because of these transactions.

Just two months ago, BIA officials appeared before the House Subcommittee on Interior Appropriations to discuss the fiscal year 1994 BIA budget request. It increases the BIA Office of Trust Funds Management by 6 million dollars next year. That office has about 50 full-time employees to manage our money, nearly three times what they had three years ago.

The same people who are here from the BIA today told the House Subcommittee that only about 60 Tribes are actively involved in working with BIA to invest their trust funds and, I quote, "the rest don't have anybody that understands enough about the investment market to give us any instructions, or they leave it up to us."

Well Red Lake is not sure if we are one of the 60 or one of the rest. But we are not dumb. We want to manage our investments. And we surely do not want to leave anything up to the BIA. Despite our requests, BIA has never regularly given us monthly reports on the status of our trust accounts. When we do get them, we can't read some of them. That is not because we

are illiterate and can't read. It is because some of these BIA papers cannot be read. They are illegible. It must be that BIA invisible ink.

BIA says it provides all information sought by a Tribe about its accounts. But we get information only sporadically, only after we move heaven and earth to get it, and even then it is invisible. We worry that our money is disappearing just as fast as BIA records are disappearing.

BIA Has Not Shown Good Faith To Our Tribe

For years we have met with BIA officials from the Assistant Secretary on down, and have always been assured that BIA had just recently gotten back on track with a costly new plan by which BIA would soon fix any old errors and avoid new ones.

My Tribe is tired of hearing this message. It sounds more and more outrageous as each year passes by and BIA spends more and more federal funds to cover up its failures and lose more of our funds.

BIA Efforts to Thwart Our Tribal Audit Of Our BIA Trust Funds

A few years ago we began to get alarmed at what looked like a costly and cozy relationship that appeared to be forming between BIA and the Arthur Andersen audit firm. Arthur Andersen is on a time and materials contract in which the sky is the limit, and the scope of its audit is quite limited.

Distrusting this BIA-controlled audit, Red Lake last summer exercised our P.L. 93-638 authority to contract for a portion of the BIA audit funds to purchase our own independent audit of the BIA's mishandling of our tribal trust funds. Under our audit, the Tribe is the audit client. The Tribe receives communication directly from the independent auditor.

Within days of the contract award, the BIA began vigorous efforts to try to withdraw our contract award that probably cost the BIA more than our $70,000 audit contract award. Since our contract scope of work requires our auditor to have full access to the BIA work papers and accounting records relating to our funds, we think BIA feared even more problems would be uncovered than have been to date. The BIA efforts to withdraw our auditing contract went outside the boundaries of human decency. One day after the funeral of our key financial staff person on this audit, D. Michael Petersen, BIA officials contacted the Tribe to again try to persuade us to drop the audit now that Mr. Petersen was no longer able to be part of it. A few weeks later, two officials came to the Reservation with the same message -- one of the Tribe's key staffer's was gone and they wanted to see Mr. Petersen's work papers relating to our ongoing audit. They kept saying the contract was awarded to Red Lake by mistake and that if every Tribe did the same thing there could be no Arthur Andersen audit. This made the Tribe all the more determined to do the audit.

Challenges do remain. The BIA still will, if it wants, be able to play a paper game and keep away from our auditor documents and work papers that show what really happened to make our money disappear. But we must try. And I have high hopes that the new Interior Secretary, Bruce Babbitt, and newly nominated Assistant Secretary for Indian Affairs, Ada Deer, will dedicate significant energy to charting a new course of direction that brings fairer dealings with Tribes, the supposed beneficiaries of the United States's trust relationship.

The Next Step -- Paying The Bill Once The Truth Is Found

Getting the truth is the first step. My Tribe contracted the truth-finding function of the auditor because we somehow doubted that truth would come from letting the fox's auditor count how many chickens were missing.

The second step is just as hard. Mr. Chairman, if our audit does find additional evidence of even more BIA looting or loss of our tribal trust funds, I as the elected leader of my people, owe it to them and to our future generations, to work with you to make the United States make it right to my people.

I and my people recognize that the federal deficit problem makes it harder than ever for the United States to spend dollars on Indians. But the United States recently bailed out savings and loan institutions because certain officials lost billions of dollars depositors entrusted to their safekeeping. Certainly the United States should do the same for Indian trust funds lost by the United States itself. Surely the United States, which has in recent years bailed out private companies like Chrysler Corporation, municipal governments like New York City, quasi-governmental agencies like the Farm Credit Services Bureau, and inumerable foreign governments, can and should do justice to Indian Tribes and restore to us our money our trustee lost.

S. 925 Provisions

On the specifics of S. 925, we strongly support the provision that makes investment of our trust funds in interest-bearing accounts mandatory under Section 101. We welcome the statutory repeal of certain limitations on the liability of the United States in Section 101, given how difficult it has been for Red Lake to get the United States to pay us back for its errors. We also are pleased that Section 102 will authorize the Secretary to pay interest that should have been earned on our accounts.

Red Lake is eager to join in the demonstration program set forth in Title II. We want to be regain control of our funds and will seriously consider submitting a plan to do this under the demonstration program. We do ask that you amend Section 206 to permit a Tribe to get BIA money under contract to purchase technical and financial assistance from third parties chosen by the

Tribe and not the BIA to develop, implement, and manage demonstration program plans.

We are concerned that Title V deals with BIA accountability in the future, after October 1, 1993. We understand the importance of this provision. But before the future is fixed, we have to address the past. We are alarmed at what has been taken from us up to this time and do not trust that the BIA audit through Arthur Andersen will fix the problem for us. At the very least, we ask that you amend Section 501(c) so that each Tribe may contract for BIA funds under P.L. 93-638 authority so that the Tribe can hire its own independent auditor to audit the BIA's handling of the Tribe's and its members' trust funds.

Conclusion

In summary, Mr. Chairman, I have always felt that we Tribes have allowed the BIA to make this problem far more complex than it really has to be. It does not take a rocket scientist to manage money properly. What it takes is staff who will be held accountable for any laziness or negligent error. Accountability is what is missing in the BIA today.

On behalf of my people, I thank you for listening and for your work.

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TESTIMONY IN SUPPORT OF S. 925

"THE NATIVE AMERICAN TRUST FUND ACCOUNTING AND MANAGEMENT REPORT ACT

BEFORE

THE SENATE COMMITTEE ON INDIAN AFFAIRS

June 22, 1993

Submitted by **Martin J. Whitman**

My name is Martin J. Whitman. My purpose in testifying today is to voice support for the enactment of S. 925, the "Native American Trust Fund Accounting and Management Reform Act of 1993." I intend to address the reasonableness of the accounting, audit, control and disclosure requirements applicable to the Interior Department, the need for self-determination to ensure that Indian trust monies are managed and administered exclusively in the best interest of the account holders, and the opportunities for new jobs and skills that this Bill can encourage.

I am Chairman of the Board and Chief Investment Officer of Danielson Holding Corporation, an American Stock Exchange listed company that wholly-owns HomeFed Trust Company, a California trust company that provides trust management, administration and custodial services to individuals and corporations. I am also the founder of M. J. Whitman & Co., Inc., currently M. J. Whitman, L.P., which is engaged in the securities business as a broker/dealer and members of the NASD. I have also been on the faculty of the Yale School of Organization and Management for the past 15 years.

Since 1974, my companies, clients and I have been engaged in numerous active and passive transactions in the debt securities of troubled companies. I have also served as an investment adviser to investment companies and financial adviser and investment banking adviser to numerous solvent and financially distressed companies. I have been providing advice to Blackfeet National Bank and have been counseling tribes during the last few months on financial matters and structure. It is in this capacity that I am testifying today.

STANDARDS

Under Title III, Section 301, the bill provides the Secretary of the Interior must establish policies, procedures and systems to accurately and periodically report trust fund balances to account holders. The seven requirements enumerated in the bill are basic and fundamental to the management and administration of any funds held and managed in a fiduciary capacity. Indeed, the U.S. Comptroller of the Currency ("OCC"), the

federal agency which supervises national banks, has prescribed minimum trust management and administration standards which substantially exceed those identified in this bill. The failure of a federally regulated bank to satisfy such requirements codified in 12 C.F.R. 9 has been found to constitute an unsafe and unsound banking practice and breach of fiduciary responsibility. It is my understanding that the Federal Reserve Board has applied these same standards to member bank trust departments and that the FDIC and OTS have applied the OCC promulgated standards to their constituent institutions. Indeed, one cannot prudently manage and administer any funds without timely access to the same type of information that this bill requires to be disclosed to the holders of the accounts. Perhaps, this explains why GAO reports suggest that Indian trust funds are badly managed and poorly administered to the detriment of the Indian account holder. If the BIA cannot discharge its responsibility as a fiduciary or prefers not to assume this responsibility, it should not remain custodian, administrator or manager of Native American trust assets.

SELF-DETERMINATION

Presently, the tribes and individual Indians own $2 billion that is held in trust. But because it is managed by the BIA, the tribes get no economic benefit from their money, other than interest, (and I would guess that the BIA investment staff is not able to obtain returns as high as those obtained by professionals who are paid 10 or 20 times as much as the BIA employees). By offering tribes the freedom to control or direct the investment of their own money, Congress will be opening bright new opportunities and provide economic power to the tribes, including the opportunity to earn higher yields, promote reservation development and increase their economic clout.

I recognize there may be concerns about risk. I am involved on a daily basis in the full range of investment -- from buying and selling stock to buying and selling companies. With proper counseling, a tribe can knowledgeably assume as much or as little risk as it wants when selecting an investment approach. More to the point, I believe there are many ways the tribes can invest in order to promote reservation economic development while acceptably limiting the risks to their principal. The key is in the advice they receive. I urge the Committee and the Interior Department to pay a great deal of attention to how to implement Section 206 under which technical assistance is to be provided to the tribes. I also recommend that the BIA contract out the review and auditing of the tribal investment plans. The kind of expertise needed to do this properly is more likely to exist in the private sector than in the Federal government.

Simply put, this bill is a small but important step necessary for Native Americans to take control of their own future. They should determine the appropriate vehicles for management of tribal funds. They should set up new financial institutions so they can collect the fees now paid to others for managing their money. They should target business development and housing projects on their own reservations. They should own the companies which will reinvest their funds. They must provide their own financial services because the government cannot do it, the non-Native American private sector will not do it, and Native Americans have a right to do it.

JOB TRAINING

The Bill properly underscores the importance of training opportunities for Native Americans in financial institutions. Without adequate training, Native Americans will remain forever economically dependent.

I have been a member of the Yale University School of Management faculty for 15 years. Yale has a keen interest in conducting management and financial seminars for tribal leaders. I personally have a keen interest in assisting tribes to institutionalize financial vehicles to support major economic development projects on reservations. The HomeFed Trust Company is prepared to act as sub-adviser to Blackfeet National Bank and perform the type of services identified in the Bill. There is no question that HomeFed Trust in conjunction with Blackfeet National Bank would provide far more efficient and accurate services to Native Americans than are now provided by the Bureau of Indian Affairs.

Highly successful specialists in investment management, MESBIC operations, and targeted investments have also indicated a strong desire to become sub-advisers to Blackfeet National Bank and affiliated Native American institutions with a view toward bringing the management of these activities more and more under the control of well-trained Native Americans.

While the Bill does not address all the needs of Native Americans, it is an important start. I urge you to move this legislation forward so that we will not return to this Committee room 10 years from now in order to discuss these same problems.

Written Testimony of the Navajo Nation on S. 925, "Native American Trust Fund Accounting and Management Reform Act of 1993"

The Navajo Nation would like to thank the Senate Committee on Indian Affairs (SCIA) for the opportunity to submit written testimony on S. 925, the "Native American Trust Fund Accounting and Management Reform Act of 1993." The Navajo Nation requests that its comments be included as part of the written record to the hearing held before the Committee on Tuesday, June 22, 1993. The Navajo Nation testified in person at last year's oversight hearing on trust fund management and welcomes the opportunity again to express its views concerning this legislation.

INTRODUCTION

In recent years, the Navajo Nation has succeeded in gaining more control of its own trust funds. We support the intent of S.925 since this legislation could potentially increase our authority in overseeing our own investments. Through our written statement, we would like to share the Navajo Nation's successes in

managing its investments, urge the SCIA to support even greater tribal management over Indian Trust Funds and recognize our unsuccessful attempts to have the Bureau of Indian Affairs(BIA) transfer all trust funds authority to the Navajo Nation.

OVERVIEW OF THE MANAGEMENT OF NAVAJO INVESTMENTS

In 1957, the Navajo Nation enacted legislation authorizing the creation of a Navajo Education Scholarship Trust Fund and dedicated $5,000,000 for college scholarships for Navajo students. In 1968, Merrill, Lynch, Pierce, Fenner and Smith was retained as investment experts to increase the investment capacity of the Scholarship Trust Fund.

Although our involvement in managing a portion of our own Trust Funds began nearly four decades ago, up until 1985, at least 90 percent of Navajo Nation investments were managed by the BIA.

Since then, however, the Navajo Nation has been able to steadily increase the amount of funds under its control. In 1985, the Navajo Nation received over $150 million dollars as a result of the Kerr McGee v. Navajo tax decision which upheld our taxing authority without requiring Secretarial approval. Realizing that we could not foresee the future in terms of financial resources, the Navajo Nation Council approved legislation creating and authorizing a "Permanent Trust Fund." The original purpose of this legislation was to put in trust-under tribal control-a recurring source of money so as to maintain future fiscal stability of the Navajo

Nation. This would allow the Navajo Nation to accumulate wealth so that the proceeds could be used to supplement the tribe's finances after the year 2010.

In 1986, the Navajo Nation Council established and authorized the Navajo Nation to administer four different Navajo Trust Funds dedicated to specific needs totalling $21 million. The Nation has invested the principal and, from the interest only, awards grants consistent within the purposes of each fund.

In the development of the aforementioned Permanent Trust Fund, we invested in local institutions through the purchases of certificates of deposits, short-term annuities, and other short-term assets. After much discussion, we recognized that our investment strategies and practices were not conducive to the original purpose of the Permanent Trust Fund. Through the assistance of financial advisors and our growing in-house expertise, in 1989 and 1990, we embarked on a sophisticated Investment Management Project. The net result of the Project was the adoption of the "Navajo Nation Investment Policies and Procedures," which now governs all Navajo Nation invested assets. The plan was approved by the Budget and Finance Committee of the Navajo Nation Council on November 5, 1991, and includes the statement that the investment of all Navajo Nation Financial Resources, including those financial resources held by the BIA, are to be under the direct investment control of the Navajo Nation.

The Navajo Nation's overall investment program, pursuant to the aforementioned policies, was formally implemented in January 1991. Our current investment policies are very similar to state, city and county policies in that funds

categories are established. We have prohibitions on certain investments such as investments in real property. We try to achieve a maximum rate of return given the risk levels, and we try to maintain a certain amount of liquidity. The policies are enforced by the Nation's Investment Committee and all final decisions are made by the Budget and Finance Committee of the Navajo Nation Council.

As a result of our independent investment program, the Navajo Nation realized a number of benefits. Not only were we able to place the monies in securities of our choices, we were able to deposit large sums of money into local banks in our area. These deposits yielded returns in that we were then able to leverage loans from area banks for the benefit of the Navajo people. We also have been able to increase our returns as compared to the returns achieved by the Bureau, and with the same level of risk. The investment results for 1991 and 1992 have indicated that by moving some funds into longer maturity bonds, the return on these funds achieved at least a two to two and one-half percent greater return than the BIA. In addition, by moving some funds from short term investments into stocks, the return on these funds achieved at least a four and one-half to five percent greater return than the BIA. As a result of these actions, the Permanent Trust Fund has nearly tripled in value since it was established in 1985 according to our most recent audit. In addition, as of December 31, 1992, the BIA had been overseeing 23.8 percent of the Navajo Nation's investments as compared to 90 percent in 1985.

ALLOW NAVAJO NATION (AND OTHER INDIAN TRIBES) AUTHORITY TO MANAGE TRIBAL TRUST FUNDS

Because of the Navajo Nation's success in managing our own funds, we would like to pursue taking over complete management and control of all Navajo investments. We view this legislation as an important means of accomplishing this goal because it allows for the voluntary withdrawal of funds held in trust by the BIA. Title II-Section 208(a) of the bill provides that "An Indian tribe may, in accordance with this section, submit a plan to withdraw some or all funds held in trust for such tribe by the United States and managed by the Secretary through the Bureau."

We interpret Section 208 as not requiring a tribe to participate in the demonstration period of five years as provided for in Sections 203 and 204 of S. 925. Under these sections, the bill provides that an Indian tribe may submit a plan to the Secretary to demonstrate new approaches for the management of Indian trust funds held in trust by the United States. The demonstration plan must meet certain criteria, one being that the plan not exceed five years.

In light of the extensive history of Navajo investment management and our comprehensive investment policies, there appears to be little need for a Navajo Nation Demonstration period. We recommend that tribes, like Navajo, who have extensive experience be allowed to begin withdrawal without a demonstration period.

Although we support the Committee's intent on improving the management of Indian trust funds, the Navajo Nation would like to recommend that certain

aspects be clarified. S. 925 as currently written, may not address all funds held in trust and invested by the BIA. The BIA holds funds pursuant to the Indian Tribal Judgment Funds Use or Distribution Act 25 U.S.C. § 1401 et seq. Since this proposed legislation does not clearly provide access to these funds, a tribe such as the Navajo Nation, may be required to seek separate legislative authorization to access such funds due to the Congressional review and acceptance of the distribution plans as provided by 25 U.S.C. §§ 1403 and 1405.

We would suggest that Section 208 of S. 925 be amended to make it clear that the reference in 208(a) includes funds held pursuant to plans adopted pursuant to 25 U.S.C. § 1401 et seq. In the alternative, report language to that effect may be sufficient. We raise this point because to date, the BIA has taken the position that without a Congressional authorization it cannot release Indian Tribal Judgment funds to the Navajo Nation.

Further, Section 208 should be amended to provide that there be an accounting and reconciliation of funds process between the BIA and tribes prior to or contemporaneous with the release of funds. Unfortunately, tribal records and BIA records appear to be inconsistent and create the impression that funds held by the BIA may have been misallocated or improperly accounted for over time. Such a reconciliation process would address these issues and allow claims to be made by a tribe, if necessary.

ATTEMPTS TOWARD TRANSFER OF BIA TRUST ACCOUNTS TO NAVAJO NATION

The Navajo Nation began serious discussions with the BIA in 1990 regarding the possibility of withdrawing the remainder of our tribal funds from the BIA's trust supervision. On deposit with the BIA are Navajo Nation funds received in settlement of claims in Dockets 69 and 299, 256-69 and 377-70 and 588-83L before the United States Claims Court.[1] The Indian Tribal Judgment Funds Use or Distribution Act as codified in 25 U.S.C. §1401-1408 governs all tribal judgment fund distributions.

The discussions with the BIA are ongoing and may yet be resolved between the Navajo Nation and the BIA, if the Nation can clarify some aspects of the judgment plans. In at least two of the claims cases noted above, it appears that this may be the case.

Further, the BIA has, as of May 1993, begun to release funds to the Nation which are not the subject of 25 U.S.C. § 1401 et seq. Judgment plans. These are funds derived from the Navajo Nation's trust assets, minerals, timber, land leases, etc. To date we have received and are now investing significant sums through this action of the BIA.

The BIA has offered to invest the remaining judgment funds pursuant to

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[1] None of the Navajo Nation judgment claims funds provide for per capita payments to members. Each dedicates interest earned to specific activities, such as scholarships or chapter (local unit of government) development. It is the Navajo Nation's intent to continue the restrictions on use of the funds, but to direct and control the investment to maximize the return.

instructions from the Navajo Nation. This accommodation, while helpful, may not prove to be effective as the BIA indicates it is restricted by law and regulations as to the type and nature of investment placements it may make. S. 925 appears to liberalize the provisions of 25 U.S.C. § 162(a) which states that the Secretary of the Interior is authorized to invest tribal funds held in trust by the United States in banks at the Secretary's discretion. However, it appears that the overall rate of return may remain less than what the Nation is currently receiving by investing pursuant to the Navajo Nation Investment Policies and Procedures which provide for a more diversified investment portfolio.

RECOMMENDATIONS

First, the Navajo Nation proposes that language be added to state that funds held by the BIA pursuant to the "Indian Tribal Judgment Funds Distribution Act", are subject to Section 208 dispersal to the Navajo Nation. This would allow for the payment of judgment funds directly to the affected tribes so that they can manage and control their own investments. At Navajo, we certainly have demonstrated that we possess the resources and capability to do just that --- manage our own resources. Second, we would like to propose that Indian tribes be given options in how they can organize those funds. Third, we would like to pursue mechanisms to allow tribes to access trust accounts, general accounts, and other financial resources in order to have better record keeping, quick transfer to a tribe's own bank, and to invest in assets pursuant to tribal investment policies.

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CONCLUSION

The Navajo Nation believes that with the expertise we have acquired and the safeguards and mechanisms we have established, the time has come for us to assert direct control so we may maximize our revenue and savings for our people.

We look forward to working with the Committee to discuss ways to achieve direct tribal control and to rightfully take our place as trustee for our own funds and, in turn, our own future.

June 15, 1993

Senator Daniel K. Inouye, Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Senator Inouye,

I wish to thank you for your invitation to appear before the Select Committee on Indian Affairs at the hearing June 22, 1993, on S.925 regarding the management of Indian trust funds. Unfortunately a prior commitment will make it impossible for me to appear in person.

Nevertheless, I have the following comments on S.925 and the management of Indian trust funds in general. I feel that I am qualified to speak on this matter after some 30 years spent as an officer in a major trust department responsible for all aspects of trust management, accounting, and investment policy. In addition, from May 1, 1992, to May 1, 1993, I served as a consultant to the BIA Office of Trust Fund Management in Albuquerque New Mexico. During that year I studied and evaluated the various systems, procedures, and practices of that office.

I am retired and have no ties with any bank, broker, investment management firm or trust system vendor.

My comments are as follows:

I strongly approve of S.925 which enables Indian tribes and individual Indians to manage their own trust fund assets, either directly or through a professional manager such as a bank, broker, or investment management company. Such a change will make available to the Indians all the investment management, accounting, and reporting expertise which is now available to all other individuals and corporations.

Scores of capable and financially responsible institutions now manage innumerable types of assets, from stocks and bonds to real estate and mineral interests, and the Indians should have such professional and skilled management available to them.

Further, I do not believe that the BIA can match, today or in the near future, the skill and depth of experience in asset management that exists in private financial institutions. Present BIA capabilities in investment management and concomitant data processing accounting and reporting systems are <u>far</u> below those of banks and management firms in the private sector.

I also strongly support the establishment of training programs for Indians in financial management so that in the future Indians can "hold their own" in this highly technical and specialized field.

However, I do have the following serious concerns, all of which pertain to the implementation of the programs authorized by the Bill:

1. At the present time I doubt that the BIA has in place the investment expertise needed to evaluate, in a professional fashion, the various demonstration projects which will be presented to them, nor to evaluate the numerous asset managers which will solicit management contracts from the tribes.

2. Neither does the BIA have in place the data processing and manual accounting systems needed to comply with Title V (b) regarding periodic "performance" statements if such statements are to reflect realized and unrealized gains and losses in assets held. In addition, I believe that for the some 300,000 individual Indian accounts, the requirement of monthly statements is unduly burdensome and expensive. If this requirement were changed to quarterly, the savings in postage and processing expense would be considerable, and the Indian owners would receive adequate information concerning their accounts.

3. More generally, the BIA does not have in place a data processing system capable of accounting for equity investments or equity derivatives, either through the use of pooled funds or individual holdings. In order to provide a "state of the art" investment and reporting system, the BIA should acquire the use of a proven trust accounting system for tribal accounts from one of the several vendors who provide such systems to major banks. It may be possible to modify the present system used for individual Indian accounts so that it can account for units of a pooled equity fund(s).

4. I am somewhat concerned that the Bill makes little distinction between tribal accounts and individual Indian accounts. In practice, this distinction is of prime importance, not only from an accounting point of view, but from an administrative and investment point of view as well. The investment of tribal funds and the accounting for such funds will be widely different from that for the bulk of individual accounts.

Thank you again for your invitation to testify before your committee. I wish I could attend in person, but unfortunately I cannot at this time. I am always available, however, to answer any questions you or your staff may wish to ask.

In closing, I would like to emphasize my conviction that to whatever extent you can make it possible for Indian Tribes and individuals to have access to the investment management and accounting services available to the rest of us, through brokers, trust departments, and asset managers, then to the same extent both the Indians and the BIA will benefit.

Respectfully submitted,

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